SUPREME COURT, U.S.
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No.

IN THE

Supreme Court of the United States

GEORGE W. and HARRIET M. CRAWFORD,
Petitioners,

v.

SIGNET BANK, ET AL.,
Respondents.

On Petition For Writ of Certiorari To
The District of Columbia Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the lower courts' rulings on petitioners' claims of mortgage lending discrimination under 42 U.S.C. sections 1981 and 1985(3) are contrary to this Court's rulings on summary judgment motions when, based on the evidence of record, there are genuine issues of material facts in dispute?

II. Whether the legal standard adopted and applied by the D.C. Circuit to the facts of this case create uncertainty among the Circuits in determining whether a *prima facie* case of mortgage lending discrimination was established?

III. Whether expert testimony is required in negligence and appraiser professional malpractice claims when the appropriate standard of care is within the realm of common knowledge and everyday experience, and the professional malpractice acts are clearly in violation of the Uniform Standards of Professional Appraisal Practice?

IV. Did the district court abuse its discretion by striking the affidavit of a fact witness whose testimony was based on personal knowledge, experience, and observation?

LIST OF PARTIES

The parties to the proceedings in the Court whose names do not appear in the caption are

Signet Mortgage Corporation
Steele Software Systems Corporation
Capitol Appraisal Service, Inc , and
Stephen F Fenning

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PETITION FOR WRIT OF CERTIORARI

George W. and Harriet M. Crawford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 25, 1999, and denied rehearing and rehearing en banc on August 23, 1999.

OPINIONS BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit denying petitioners rehearing en banc is reprinted in Appendix A at 1a. The Order of the hearing panel denying petitioners rehearing is reprinted in Appendix B at 2a. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reprinted in Appendix C at 3a. The District Court's Memorandum Opinion is reprinted in Appendix D at 11a and the Order granting respondents' summary judgment is reprinted in Appendix E at 24a. The affidavit of Howard L. Popkin is Appendix F at 26a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinions denying petitioners rehearing and rehearing en banc on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the statutes are set forth below:

42 U.S.C. § 1981
Equal rights under the law

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1985(3)
Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such

State or Territory the equal protection of the laws, or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy, in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

In February 1994, respondents Signet Bank and Signet Mortgage Corporation (Signet) contacted petitioners, who are African Americans, via telephone. Signet offered to refinance the first and second mortgages on petitioners' home. On March 12, 1994, Signet completed its "Commitment Control Lock" which "locked in" the loan for sixty (60) days as a refinance "no cash out" transaction. The loan application, however, approved on March 24, 1994, after Signet learned the petitioners race, changed the loan from a "no cash out" to a "cash out" transaction. This change in loan condition decreased the loan-to-value ratio from 95% to 71% and required the property to appraise for at least $311,000. The loan was approved pending the completion of an appraisal of petitioners' home that would serve as collateral.

Signet retained respondent Steele Software Systems Corporation (Steele) to conduct the appraisal. On April 4, 1994, respondent Stephen F. Fenning (Fenning), an employee

of respondent Capitol Appraisal Service, Inc. (Capitol) performed an appraisal and interior inspection of the property located at 2302 First Street, N.W., Washington, D.C. Fenning, in an April 8, 1994 appraisal, opined that the fair market value of the property was $190,000.

Petitioners protested the appraisal and at the request of Signet's loan officer sent 2 appraisals that had determined the fair market value of petitioners' home to be in excess of $300,000. The appraisals conclude that the fair market value of petitioners' home on August 23, 1990, was $304,000 and the property value was $340,000 on August 10, 1993.

In response to petitioners' protest Signet directed Steele to review the appraisals. Steele did not review the appraisals, it sent another appraiser to conduct a drive by market analysis of the property. The drive by appraiser reported that the fair market value of petitioners' home was not $190,000 but $145,000. As a result of the Fenning appraisal and the drive by market analysis, Signet notified petitioners on May 4, 1994, that the loan was denied for "inadequate collateral."

On November 7, 1994, another appraisal was performed of petitioners' home by an independent appraiser at the request of another mortgage lender. This appraiser estimated the fair market value of the property to be $337,000.

Petitioners filed an action against respondents alleging unlawful mortgage lending discrimination, negligence, and professional malpractice. They sought declaratory relief, compensatory and punitive damages on the grounds that respondents' acts were unlawful intentional discrimination and redlining in violation of 42 U.S.C. § 1981. Petitioners also contend that respondents acted in concert to deny their rights to the equal protection of the laws and conspired to deprive petitioners of their federally protected right to make and enforce contracts in violation of 42 U.S.C. § 1985(3).

Petitioners further alleged that Signet owed a duty to review and evaluate their mortgage loan application and this duty included reviewing the appraisal it had ordered with the level of care and skill that the average financial institution would have exercised. Petitioners contend that Signet breached its duty by denying the loan on the basis of an appraisal that it knew grossly undervalued the fair market value of petitioners' home.

Petitioners allege that Steele, Capitol, and Fenning breached the standard of care to perform an appraisal with the skill and competency of a licensed appraiser in the District of Columbia acting under similar circumstances.

The district court granted respondents summary judgment on all counts and the appellate court affirmed. While the district court's bases for granting respondents' summary judgment delineated in the memorandum opinion is not rationally related to the evidentiary record, the appellate court affirmed on the basis that petitioners did not establish a prima facie case. The appellate court held that petitioners did not prove they were "qualified" for the loan. Specifically, the appellate court held that there was no evidence before the district court to satisfy the loan condition with respect to the collateral requirement of the market value of petitioners' home. The appellate court's ruling is that petitioners' did not provide evidence to establish that their home had a market value of at least $311,000 in April 1994.

Notwithstanding the fact that Signet's underwriter changed the loan-to-value ratio, petitioners met the qualification requirement. The evidentiary record supports a finding that petitioners' home was valued at substantially more than $311,000 in April 1994.

Petitioners purchased their home in August 1984. The property was a "shell" that had been "gutted." The evidence of

record is that petitioners rehabilitated the property and the last major rehabilitation project was completion of the basement in December 1992. Rehabilitation of the property was completed when respondents performed their appraisal in April 1994.

Based upon respondents' expert witness' Rule 26(a)(2)(B) report, and the analyses of the appraisals in the evidentiary record, the market value of petitioners' home was $337,800 in April 1994. The evidence is that respondents' expert witness concluded that an appraisal of petitioners' home performed February 27, 1989, with a market value of $225,000 provides the best indicator of the value of the property at the time the appraisal was completed. The evidentiary record shows that subsequent to this appraisal petitioners added $112,800 in improvements.

The estimated market value of $337,800 is consistent with the $340,000 appraised value 8 months before respondents' $190,000 appraisal, and the $337,000 appraised market value performed 7 months after respondents' appraisal. In addition, Signet's Senior Residential Appraiser reviewed the $340,000 appraisal and concluded that it would be acceptable to a lender.

This evidence, standing alone, presents a genuine issue of material fact concerning the fair market value of petitioners' home in April 1994. There is, however, additional record evidence concerning the market value of the property.

The evidence proves that there are many homes in the 2300 block of First Street, N.W. that have been rehabilitated with market values between $276,000 and $400,000. Affidavits establish that 2313 First Street is valued in excess of $285,000. The property at 2316 First Street was valued at $276,000. The home at 2315 First Street was purchased in 1988 for $279,000. The property at 2300 First Street was last appraised in 1990 with a market value of $325,000. The mortgage broker who owns 2300 First Street was deposed by respondents and

testified that his neighbor, Real Estate Broker Brian Logan, who owns 2301 First Street, N.W., estimated the value of 2300 First Street to be between $375,000 and $400,000.

ADDITIONAL EVIDENCE OF RACIAL DISCRIMINATION

This is not a "smoking gun" case to prove intentional discrimination. Direct evidence of intentional discrimination is not presented in the evidence. There is, however, substantial indirect and circumstantial evidence to warrant the case going to a jury.

Signet's Home Mortgage Disclosure Data

A statistical analysis of Signet's Home Mortgage Disclosure Act Data (HMDD) further supports the finding that Signet and its appraisers conspire to discriminate against loan applicants based on their race and the racial composition of their neighborhood. The data shows that Signet intentionally discriminates and appears to have instructed its employees on how to complete the HMDD to avoid detection. The statistical evidence is further proof that Signet and its appraisers have engaged in a pattern and practice of undervaluing the market value of properties located in predominantly African American neighborhoods.

Dr. Calvin Bradford, who holds a Ph.D. in statistical methodologies from Northwestern University, determined that based upon HMDD filed by Signet:

> Overall for the four years [1993 through 1996], the rejection rate for African-Americans is just under three times the rejection rate for white applicants. This, however, appears to mask an even larger difference when we note that the rejection rate for loans with no race given is almost five times the white rejection rate.

> These loans are largely from minority areas. Indeed, when we compare rejection rates based on the racial composition of the census tracts of the properties to be financed by the loans, we see that the rejection rate for the tracts that are more than 50% minority is over three times the rejection rate for loans from tracts that are less than 25% minority.

Dr. Bradford concludes that "these data provide a pattern that is consistent over time . . . a pattern that is consistent with discriminatory treatment of loans from African-American and from African-American and minority areas." In addition, Dr. Bradford concludes that "the pattern is consistent with a claim of discrimination based on the rejection of a loan in an African-American area due to the collateral."

Dr. Bradford discerned another pattern from Signet's data. He found that Signet did not always report the race of applicants. He concluded this pattern is consistent with a lender that is masking the true levels of treatment to minorities through the inconsistent application of the exception for collecting racial data on applicants.

The statistical analysis was limited to refinance loan applicants, the same as petitioners, that were denied or approved in the District of Columbia solely for "inadequate collateral." The data is not a summary of sample data, it represents the entire population of Signet's refinance applications in the District. All refinance mortgage applicants, African American and white, were similarly situated.1 They had complied with the lending

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1 The minimum objective requirements include (1) complete credit application, (2) sufficient credit references, (3) verifiable credit references, (4) regular employment, (5) verifiable employment, (6) sufficient length of employment, (7) sufficient income, (8) verifiable income, (9) not have excessive obligations, (10) credit file in

qualification requirements with the exception of the appraisal report that would be ordered by Signet and performed only by an appraiser from its approved list.

Dr. Bradford's Testimony

Dr. Bradford was deposed on December 19, 1997. During his deposition he testified that "the discrimination exhibited by Signet would be intentional discrimination, based on my understanding that they were aware of the issues involved and took no action."

He explains that in regard to the appraisal, the effect of the process was discriminatory in that:

> . . . confining yourself to taking comparables only from this small neighborhood to make evaluations about rehabilitation of an even smaller subgroup of properties in the neighborhood, all of the comparables being from black neighborhoods, doesn't allow the houses in this neighborhood to have exposure to what in my view would be the full market, advantages of the full market. It restricts everything that happens to these houses to what happens in black neighborhoods, which in my view, because of historical discrimination, are likely to have depressed property values as a result of discrimination, unless you take some other action to insure that that doesn't happen.

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consumer reporting agency, (11) sufficient credit file, (12) satisfactory repayment history, (13) period of residence, (14) permanent residence, (15) verifiable residence, (16) no bankruptcy, and (17) no garnishment, attachment, foreclosure, repossession, or suit.

The Plan to Unlawfully Affect Values in LeDroit Park

Jack May, Signet's Senior Residential Appraiser, was aware that there was "a plan" to affect the value of properties in LeDroit Park. In a May 25, 1996, letter to Clifford Frohn, Signet's Senior Vice President, May wrote that he had been in contact with appraisers on Signet's approved appraiser list. These appraisers and May discussed the fact that LeDroit Park started to undergo change in the 1980s but "has not taken off as planned." It is unclear what the "plan" involved. It is clearly unlawful, and may be purposeful intentional racial discrimination, for Signet and appraisers from its approved list to have participated in any "plan" to conspire and control the housing market in LeDroit Park. It is undisputed, however, that Signet employed 10 appraisers from its approved list in this case and all are white males.

It is also undisputed that respondents, in order to justify the appraised value of $190,000, compared petitioners' home to a property that was renovated in the 70's, beat up around the edges, needs hardwood floors, bath and kitchen needs work, the renovation in the early 70's took the character out of the house, needs paint and touch up work. Respondents also compared petitioners' single family home to a rowhouse that has been converted into a three-unit apartment building. In their appraisal respondents write that:

> Since the current owners purchased the subject in 1984, they have made extensive improvements. Much of the original detail of the property has been retained including wide staircases, intricate woodwork around the fireplaces and walls, hardwood floors and high ceilings. The current owners have renovated and refurbished these while bringing the house up to modern day standards in regards to heating/cooling, plumbing and electrical. The current owners have also finished off the basement including a rec[reation] room, half bath

and wet bar. Therefore, contrary to respondents' contention, the properties reported on respondents' appraisal were not comparable to petitioners' home.

Respondents Violate Fannie Mae Anti-Discrimination Guidelines

The evidence of record, memorialized in letters and faxes among Signet, Steele, and Capitol, is that they conspired to reject the appraisals of $304,000 and $340,000 solely on the bases that the comparable properties were, in their words, from "superior neighborhoods." The "superior neighborhoods" that respondents' identify are the DuPont and Kalorama neighborhoods. The DuPont and Kalorama neighborhoods are predominately white.2 Petitioners' LeDroit Park neighborhood is predominately African American.

Fannie Mae guidelines explicitly provide that "the appraiser must not use subjective terms or phrases - such as 'poor neighborhood,' 'good neighborhood,' and 'superior neighborhood'." Respondents' use of the racial composition of petitioners' neighborhood as a factor in estimating market value is a discriminatory practice in violation of Fannie Mae guidelines and established law.3

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2 Petitioners' telephone exchange is "387" and they were solicited via telephone by Signet's telemarketing department. The "387" telephone exchange is assigned primarily to the Kalorama neighborhood.

3 Historically, appraisal models of neighborhood life cycles have associated minority concentrations and the influx of minorities with decline in values and economic decline in the neighborhood. In 1977 the Justice Department, in United States v. The American Institute of Real Estate Appraisers of the National Association of Realtors, 442 F.Supp 1072 (N.D. Ill) entered into a settlement order that adopted three policy statements:

(1) It is improper to base a conclusion or opinion of value upon the

Respondents' Violate the Uniform Standards of Professional Appraisal Practice (USPAP)

Respondents owed petitioners a duty to perform and review the appraisal in compliance with Fannie Mae guidelines and USPAP. The comment to USPAP Standards Rule 1-1(c) provides that:

> This rule requires an appraiser to use due diligence and due care. The fact that the carelessness or negligence of an appraiser has not caused an error that significantly affects his or her opinions or conclusions and thereby seriously harms a client or a third party does not excuse such carelessness or negligence.

Departure from this binding requirement is not permitted.

Under the circumstances in this case, the drive-by-market analysis was not the appropriate standard of care. Richard Bowman, president of Capitol, as the review appraiser for Fenning, certified the accuracy of the appraisal and that it was performed in compliance with USPAP Standard No. 3. Bowman's certification provides that he is bound by the appraiser's certifications. Appraiser certification number 4

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premise that the racial, ethnic, or religious homogeneity of the inhabitants of an area or of a property is necessary for maximum value.

(2) Racial, religious or ethic factors are deemed unreliable predictors of value trends or price variance.

(3) It is improper to base a conclusion or opinion of value, or a conclusion with respect to neighborhood trends, upon stereotyped or biased presumptions relating to race, color, religion, sex or national origin or upon unsupported presumptions relating to the effective age or remaining life of the property being appraised or the life expectancy of the neighborhood in which it is located.

provides, in part, that he:

> ... did not base, either partially or completely, [his] analysis and/or the estimate of market value in the appraisal report on the race, color, religion, sex, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owners or occupants of the properties in the vicinity of the subject property.

This certification requirement was meaningless to Bowman and the respondents in regard to their appraisal of petitioners' home. Respondents did not adhere to USPAP certification or Standard 3. They knowingly, willfully and intentionally disregarded their obligation not to use race as a factor in determining the fair market value of petitioners' home.

Bowman did not follow mandatory USPAP Standard 3 for conducting the appraisal review. USPAP mandates how a review appraisal is to be performed and the requirements are binding. Bowman testified that when he received the fax of the petitioners' dispute he performed a review of the two appraisals that were sent to him. His review was limited to reading the two appraisals that had been sent. The requirement under USPAP, however, was for Bowman to review the respondents' appraisal that he had certified as accurate in his capacity as supervisory appraiser. The Supervisory Appraiser's Certification provides that:

> If a supervisory appraiser signed the appraisal report, he or she certifies and agrees that: I directly supervise the appraiser who prepared the appraisal report, have reviewed the appraisal report, agree with the statements and conclusions of the appraiser, agree to be bound by the appraiser's certification 4 through 7 and am taking full responsibility for the appraisal and the appraisal report.

Appraiser's certification number 7 provides, in part, that

> I performed this appraisal in conformity with the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of he Appraisal Foundation and that were in place as of the effective date of this appraisal

Dr. Bradford's Rule 26(a)(2)(B) Report

Dr. Bradford has worked in the field of housing and lending discrimination for 25 years. He has testified before committees of Congress on lending and housing discrimination and has conducted research and policy evaluation in the areas of mortgage discrimination and insurance discrimination. Dr. Bradford has taught courses on lending discrimination and trained the staffs of state and federal enforcement agencies in investigating cases of lending and homeowners insurance complaints. He has served as a consultant on fair housing and lending discrimination to the U.S. Department of Housing and Urban Development.

Dr. Bradford writes in his Rule 26(a)(2)(B) report that when rehabilitation takes place in a minority area it should be granted the same weight in the market as rehabilitation that takes place in white areas. Appraisal discrimination has historic roots in assumptions that property values are associated with the racial composition of the area. Appraisal practices that encompass such assumptions result in defining a market by the racial composition of an area and incorporate discrimination into an appraisal.

In 1977, Fannie Mae and Freddie Mac made major revisions in their underwriting and appraisal standards in response to Congressional concerns about discrimination in these standards. One of the issues addressed in those changes was the treatment

of rehabilitation in areas that had previously suffered decline. Part of the Fannie Mae revised appraisal standard relates to the level of improvements and the treatment of properties that have values at or above the high end of the market. While such properties would normally be reviewed for concerns about being overimprovements, Fannie Mae provides that:

> The underwriter should consider the possibility, however, that the property is among those being rehabilitated in an urban area in which demand is increasing. Thus, such properties should not be considered as "overimprovements" if there is strong market interest in the properties.

A similar provision is contained in the Fannie Mae Seller Guide. Fannie Mae even makes a special allowance for block-by-block underwriting to account for early rehabilitation efforts that may not have spread to the larger market area. These provisions are generally sound for all appraisals, but they were added to the Fannie Mae and Freddie Mac guidelines specifically to respond to discrimination. These changes were designed to make it clear that proper appraisal practices did not allow the race of applicants or the racial composition of an area to influence the appraisal. This applies to the selection of the local market area and the selection of comparables.

Signet's Underwriter Changed the Loan-to-Value Ratio

Signet's underwriter changed the conditions of petitioners' loan from a "no cash-out" to a "cash-out" transaction after learning they were African American. As a result, this changed the loan-to-value ratio that was required for petitioners to qualify for the loan from 95% to 71%. This change in loan term increased the threshold appraisal requirement. Signet contends this change was necessitated by the bank's Mortgage Product Manual. The Mortgage Product Manual does not, however, provide for any loan-to-value ratio as low as 71%.

Signet's Pattern and Practice of Denying Loans to African Americans

The Washington Lawyers' Committee for Civil Rights conducted a study of lending practices in the District and concluded that Signet was more than 4 times more likely to deny African Americans than whites. Signet was ranked as the third worst with the highest rejection rates. The study shows that African American mortgage loan applicants at Signet had a significantly higher likelihood of rejection than white applicants with the same income level. After controlling for income Signet had one of the three highest rejection disparities for African Americans.

The cumulative effect of the indirect and circumstantial evidence adequately supports petitioners' claim that they were qualified for the loan. In this same regard, the evidence supports the inference that Signet and its appraisers intentionally and purposefully discriminated against petitioners because of their race and the racial composition of their neighborhood. The evidence is significantly probative enough to withstand granting summary judgments for respondents.

NEGLIGENCE AND PROFESSIONAL APPRAISER MALPRACTICE

The evidence shows that respondent Fenning did not possess the requisite skills and knowledge to competently perform an appraisal of petitioners' home. Fenning did not know the market area of the LeDroit Park neighborhood. Fenning did not select properties that were comparable to petitioners' home. He did not know the boundaries of the LeDroit Park neighborhood. Fenning described the LeDroit Park neighborhood as a suburban subdivision. Fenning selected a three-unit apartment building and compared it to petitioners' single family home.

All respondents reviewed the Fenning appraisal and

disregarded the fact that it did not adhere to the national standards in the USPAP. Had respondents properly reviewed the appraisal, and not been motivated to discriminate against petitioners, they would have concluded that the properties selected by Fenning were not comparable to petitioners' home and in clear violation of Fannie Mae guidelines and USPAP.

In view of the foregoing, expert testimony was not required for petitioners to establish the applicable standard of care or the respondents' deviation from that standard. USPAP and Fannie Mae guidelines establish the national standards that respondents should have adhered to in performing their appraisals. The facts presented in this matter are within the common knowledge and common sense of the average layperson and did not require expert testimony. Accordingly, the lower courts erred in granting respondents summary judgment on the issues of negligence and appraiser malpractice.

The lower courts also erred in striking the affidavit of Howard L. Popkin, a lay witness testifying based upon his personal knowledge, observation and experience. Appendix F at 26a is the affidavit that was stricken from the record.

REASONS FOR GRANTING THE PETITION

This case raises several substantial questions about the nature of mortgage lending discrimination, the use of indirect and circumstantial evidence to prove the necessary elements, and the appropriate legal standards and their application to the facts in establishing a prima facie case and creating a presumption of racial discrimination in mortgage lending.

The D.C. Circuit's decision in this case imposed an "inflexible and rigid" requirement on parties bringing racial discrimination claims against mortgage lenders and their appraisers, and is inconsistent with the requirements adopted by other circuits and this Court when ruling at the summary judgment stage. The

Court's holding is that the prima facie case requirement "was never intended to be rigid, mechanized, or ritualistic." *United States Postal Serv. Board v. Aikens*, 460 U.S. 711,715 (1983)

It is unclear whether the "burden-shifting" framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applicable to racial discrimination in employment, is appropriate in racial discrimination in mortgage lending. The Court has not ruled in a mortgage lending racial discrimination case to guide the lower courts.

I.

WHETHER THE LOWER COURTS' RULINGS ON PETITIONERS' CLAIMS OF MORTGAGE LENDING DISCRIMINATION UNDER 42 U.S.C. SECTIONS 1981 AND 1985(3) ARE CONTRARY TO THIS COURT'S RULINGS ON SUMMARY JUDGMENT MOTIONS WHEN, BASED ON THE EVIDENCE OF RECORD, THERE ARE GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE?

The lower courts held that in order for petitioners' to survive summary judgment for discrimination claims arising under 42 U.S.C. §§1981 and 1985(3), they must establish a prima facie case by showing that (1) they belong to a protected class, (2) applied for and were qualified for a loan, (3) the loan was rejected despite their qualifications, and (4) the defendants approve loans for applicants with qualifications similar to those of the plaintiffs. Citing *Latimore v. Citibank, F.S.B.*, 979 F. Supp. 662, 655 (N.D. Ill. 1997). The lower courts held that petitioners did not establish a prima facie case because they did not establish they were "qualified" for the loan by showing their home was valued at $311,000 in April 1994.

The value of petitioners' home in April 1994 is a disputed genuine issue of material fact. Accordingly, as a matter of law,

the lower courts should have found that the "qualification" requirement of the prima facie case was in dispute. The value of petitioners' home is a genuine issue of material fact in dispute for the jury to decide.

The lower courts' decisions are contrary to the decisions of this Court. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) the Court held that:

> Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Id. at 249.

A court may dispose of a case on summary judgment before trial only where there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). The standard test for summary judgment is "whether a fair-minded jury could return a verdict for the [petitioners] on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Before trial, a party must be able "to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986).

In evaluating the nonmoving parties' showing the trial judge has been directed to consider the cumulative effect of the evidence, *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 39-40 (D.C. Cir. 1987), and to grant all reasonable inferences to the nonmoving party, *Exxon Corp. v. FTC*, 663 F.2d 120, 126 (D.C. Cir. 1980). The trial court may grant summary judgment only if there is no "significantly probative" evidence

tending to support the complaint. *Anderson*, 477 U.S. at 249-50. In the present case, the possibilities of the value of petitioners' home raise questions to be considered by the jury.

The "significantly probative" test does not, however, require the nonmoving party to discredit every conceivable alternative theory of causation. The D.C. Circuit noted in *Elliott v. Michael James, Inc.*, 507 F. 2d 1179 (D.C. Cir. 1974), "there is no requirement that the circumstances, to justify the inferences sought, negative every other positive or possible conclusion." To be significantly probative, evidence need only be sufficient to permit a reasonable juror, indulging all reasonable inferences, to find that the party proved the element at issue. *Shields v. Eli Lilly and Company*, 895 F.2d at 1465. "Significantly probative" means only that, if accepted, the facts make it more likely than not that the element pressed by petitioners is present.4 The very fact upon which petitioners base their claim of racial discrimination, namely, an unlawful discriminatory appraisal, is the very basis upon which the lower courts denied petitioners a fair opportunity to prove their claim. Whether or not an unlawful discriminatory appraisal is present in fact is for the jury to decide.

The "significantly probative" test requires only that the evidence - singly or collectively - be sufficient to support a reasonable inference that substantiates a party's claim. Based upon the evidence of record in this proceeding, a reasonable juror could conclude that respondents intentionally discriminated against petitioners in violation of 42 U.S.C. §§1981 and 1985(3).

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4 It is unclear why the lower courts, with respect to the market value of petitioners' home, did not consider the Popkin appraisal of $340,000 performed 8 months before respondents' $190,000 appraisal and the $337,000 appraisal of the property performed 7 months after respondents' appraisal.

II.

WHETHER THE LEGAL STANDARD ADOPTED AND APPLIED BY THE D.C. CIRCUIT TO THE FACTS OF THIS CASE CREATE UNCERTAINTY AMONG THE CIRCUITS IN DETERMINING WHETHER A *PRIMA FACIE* CASE OF MORTGAGE LENDING DISCRIMINATION WAS ESTABLISHED?

In *Noland v. Commerce Mortgage Corp.*, 122 F.3d 551 (8th Cir. 1997) the court held that to permit the lender to change the rules and raise the amount needed to qualify "would allow lenders to change the rules of the game at any time so as to prevent an unwanted potential borrower from ever "qualifying," and thus from being able to make out a prima facie case." *Id.* at 553. The Eighth Circuit concluded that the evidence created material issues of fact on the part of the prima facie case. The D.C. Circuit, on the other hand, did not address the fact.

In petitioners' case before the Court, this is precisely what occurred. Signet's underwriter changed the loan-to-value ratio after respondent learned petitioners were African American. Changing the loan-to-value ratio is directly related to the appraisal qualification requirement and the basis for which petitioners were denied the loan. The D.C. Circuit's holding is contrary to the Eighth Circuit.

The D.C. Circuit concluded that petitioners did not meet the qualification prong of the prima facie case delineated in *Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712 (7th Cir. (1998) because they did not have the Popkin appraisal recertified within the previous four months. This conclusion is inconsistent with this Court's holding that the prima facie case requirement "was never intended to be rigid, mechanized, or ritualistic." *United States Postal Serv. Board v. Aikens*, 460 U.S. 711,715 (1983). It should be noted that in *Latimore* the Seventh Circuit took the view that one (1) retrospective

appraisal, performed months after the bank's appraisal that denied the loan, would have supported Latimore's claim of discrimination had the appraisal met the bank's 75 percent loan-to-value rule.

Moreover, the D.C. Circuit requirement that petitioner's have an appraisal recertified by an appraiser "within the previous four months" of April 1994 is an impractical exercise in futility. The D.C. Circuit would require petitioners' to have the Popkin appraisal recertified sometime between the period of December 1993 up to April 1994 in anticipation that at some time petitioners would apply for a mortgage loan and this appraisal would be acceptable to the lender. There are several problems with this scenario but first and foremost is the fact that recertification of the Popkin appraiser would not have been acceptable to Signet because he was not on its approved appraiser list.

In petitioners' case before the Court there are two (2) appraisals performed within months of respondents' appraisal that met Signet's disputed 71 percent loan-to-value ratio. Notwithstanding these appraisals the D.C. Circuit held that petitioners' did not establish that they met the qualification requirement for collateral. This too is contrary to this Court's holdings in determining whether summary judgment is appropriate. The decisions of this Court do not require that plaintiffs alleging racial discrimination prove their case at the summary judgment stage. The Court's requirement is that there is evidence in the record to show that genuine issues of material facts exist that are to be resolved by the jury as the trier of fact, not the judge.

Latimore also stands for the proposition that a plaintiff in a discrimination case can prove discrimination in a "conventional way" by presenting enough evidence, direct or circumstantial, of discrimination to create a triable case. Clearly, based upon the record evidence regarding the conduct of Signet and its

appraisers, and the two appraisals of petitioners' home, sufficient evidence was presented to warrant a triable issue.

In *Steptoe v. Savings of America*, 800 F.Supp. 1542, 1546 (N.D. Ohio 1992), the court held that a prima facie case was established when the plaintiffs could show (1) the housing sought to be [financed] was in a minority neighborhood; (2) that an application for a loan to [finance] the housing located in a minority neighborhood was made; (3) that an independent appraisal concluded that the value of the housing equaled the [amount required]; (4) that the borrowers were credit worthy; and (5) that the loan was rejected. *See Old West End Association v. Buckeye Federal Savings & Loan*, 675 F.Supp. 1100, 1103 (N.D. Ohio 1987). Applying the legal standard in *Steptoe* the evidence of record supports petitioners' claim of racial discrimination because of the racial composition of their neighborhood.

In cases alleging discrimination because of the racial composition of the neighborhood the Court should adopt the legal standard in *Steptoe*. Based upon the evidence of record in the instant proceeding, the petitioners established a prima facie case under *Steptoe*.

III.

WHETHER EXPERT TESTIMONY IS REQUIRED IN NEGLIGENCE AND APPRAISER PROFESSIONAL MALPRACTICE CLAIMS WHEN THE APPROPRIATE STANDARD OF CARE IS WITHIN THE REALM OF COMMON KNOWLEDGE AND EVERYDAY EXPERIENCE, AND THE PROFESSIONAL MALPRACTICE ACTS ARE CLEARLY IN VIOLATION OF THE UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE?

The lower courts erred in granting respondents' motions for

summary judgment on the issues of negligence and appraiser malpractice. Petitioners bear the burden of proving negligence by a preponderance of the evidence. They must establish the applicable standard of care, show that respondents deviated, and that respondents' conduct was the proximate cause of their injury. *Toy v. District of Columbia*, 549 A. 2d. 1, 6 (D.C. 1988). The evidence of record establish that respondents deviated from the applicable standard of care in conducting an appraisal in the District of Columbia and the deviation was the proximate cause of the economic loss to petitioners.

The lower courts ruled that petitioners needed an expert witness to prove negligence and professional malpractice claims because alleging negligence by respondents required expert testimony on the standard of care governing the appraisal profession. Fannie Mae guidelines and USPAP, however, establish the standard of care. Moreover, the facts in this case are not so distinctly related to residential real estate appraising that is beyond common knowledge.

Under District law an expert opinion was not required. It is well settled in this jurisdiction that to warrant the use of expert testimony the subject dealt with must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman. *Waggaman v. Forstmann*, 217 A.2d 310, 311 (D.C. 1966). It is equally well established that where the trier of facts is as competent as an expert to consider and weigh the evidence and to draw conclusions therefrom, it is improper to use expert testimony. Id. If the appropriate standard of care falls "within the realm of common knowledge and everyday experience," a plaintiff will not need expert testimony to establish a standard and a deviation. *District of Columbia v. White*, 442 A.2d 159, 164 (D.C. 1982). It is common sense and everyday experience that it was negligent to compare petitioners' home that had been completely rehabilitated with a home that needed extensive rehabilitation. Similarly, the jury could have reasonably inferred,

based upon common knowledge, that it was improper to compare petitioners' single family home with a three-unit apartment building.

The D.C. Circuit held that petitioners needed expert testimony to establish the applicable standard of care if the subject in question is so distinctly related to some science, profession, or occupation as to be beyond the ken of the average layperson. The Eighth Circuit, however, held that real estate appraisal is not an exact science. See *Latimore*, 151 F.3d at 715.

IV.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY STRIKING THE AFFIDAVIT OF A FACT WITNESS WHOSE TESTIMONY WAS BASED ON PERSONAL KNOWLEDGE, EXPERIENCE AND OBSERVATION?

The trial court erred in striking the Howard L. Popkin affidavit, Appendix F at 26a, because he was not designated an expert. On November 21, 1997, respondents noted Popkin's deposition. He was deposed on December 9, 1997, concerning the appraisal he performed on petitioners' home. During the deposition it became evidently clear that he possessed the requisite knowledge, experience and credibility to fully support his conclusion that petitioners' home had a fair market valued of $340,000 on August 10, 1993.

Popkin fully explained how he reached his determination and, more important, he had the complete appraisal file that includes all notes, evaluations, analyses, comparables, process for the selection of comparables, findings, tax records, and bases for confirming the $340,000 estimated fair market value. The respondents were unable to discredit Popkin or his estimated market value of the petitioners' home. Popkin testified that he is an expert on appraising issues and has testified numerous times as an expert on property values in the Washington

Metropolitan Area. He did not, however, have to appear in this proceeding as an expert.

Popkin concluded, based upon his appraisal and the information available to him about petitioners' home that an appraiser can not perform an accurate appraisal of the value of the property by looking at the exterior. He testified, based on his experience, personal knowledge and perception that when there is a dispute as to the estimated fair market value of an appraised property in the District, especially in the 2200 to 2400 blocks of First Street, N.W., it would not be an acceptable standard nor appropriate to perform a drive-by-market analysis. He testified that a drive-by-market analysis may be an appropriate standard for estimating fair market value in markets where the same contractor constructed all the houses, during the same period of time, and using the same general floor plan.

Popkin testified that the review appraiser should have detected the problems with the Signet appraisal had he properly performed the review. Popkin testified that USPAP has explicit requirements for conducting an appraisal review. USPAP provides that the review requirements are binding. Popkin's testimony, based upon his personal observation and perception, concluded that petitioners were not given credit for the extensive rehabilitation to their home.

The Freddie Mac Form 704 is not an acceptable standard for the appraisal industry in the transaction petitioners were involved and was not intended for this use. Popkin concluded that the methods used in the Fenning appraisal and the drive by market analysis failed to take into consideration the vital factors of interior rehabilitation and therefore failed to accurately reflect fair market value.

The Popkin affidavit is precisely the type of specific facts contemplated and required to support an opposition to a motion for summary judgment. The Popkin affidavit is based upon facts

gleaned from his first-hand knowledge and observation.

Rule 701 of the Federal Rules of Evidence provides that:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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(202) 387-0868

November 22, 1999

APPENDIX A

ORDER
OF THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
DATED AUGUST 23, 1999
No. 98-7105 September Term, 1998 (96cv02398)

George Crawford and Harriet Crawford,
Appellants
v.
Signet Bank, Inc. et al.,
Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald did not participate in this matter.

APPENDIX B

ORDER
OF THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
DATED AUGUST 23, 1999
No. 98-7105
September Term, 1998 (96cv02398)

George Crawford and Harriet Crawford,
Appellants

v.

Signet Bank, Inc. et al.,
Appellees

BEFORE: Henderson, Randolph and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed July 23, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JUNE 25, 1999

No. 98-7105
GEORGE W. AND HARRIET M. CRAWFORD,
APPELLANTS

v.

SIGNET BANK, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
No. 96cv02398

George W. Crawford argued the cause for the appellants.

Gary C. Tepper argued the cause for appellees Signet Bank and Signet Mortgage Corporation. *Samuel K. Charnoff* was on brief.

Stephen A. Fennell argued the cause for appellee Steele Software System Corporation. *Brian J. Leske* was on brief.

Jack A. Gould and *Matthew W. Lee* were on brief for appellees Capitol Appraisal Service, Inc. and Stephen F. Fenning.

Before: HENDERSON, RANDOLPH and GARLAND, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge:* George W. and Harriet M. Crawford appeal the district court's adverse summary judgment in an action for discriminatory mortgage denial and negligent house appraisal. Appellee Signet Mortgage Corporation, formerly a subsidiary of appellee Signet Bank, (collectively referred to as Signet)[1] denied the Crawfords' application for a home mortgage refinance loan on the asserted ground that the Crawfords' home equity was insufficient based on an appraisal by appellee Stephen F. Fenning, an employee of appellee Capitol Appraisal Service (Capitol). The appraisal was contracted to Capitol by appellee Steele Software Systems Corporation (Steele), an appraisal management company engaged by Signet. The district court concluded that the Crawfords neither established a prima facie case of discrimination nor articulated a standard of care for the appraisal profession, the breach of which could support a negligence claim. We agree with these conclusions and affirm the summary judgment.[2]

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[1] Signet has since been merged into First Union Corporation. *See* Signet's Certificate as to Parties, Rulings and Related Cases (filed as part of Signet's brief on Feb. 26, 1999).

[2] We also affirm the district court's denial of the Crawfords' motion to extend discovery because the Crawfords did not inform the court when the defendants filed their summary judgment motions that additional facts were needed to oppose the motions, as required by Fed. R. Civ. P. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot *for reasons stated* present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.") (emphasis added). *See Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989)

In February 1994 Lonnie Bass, a Signet employee, solicited the Crawfords by telephone to refinance their house. In March 1994 the Crawfords submitted an application for a loan in the amount of $233,000, representing the value of their house as $325,000.

On March 24, 1994 Connee Piercy, a Signet loan underwriter approved a loan for $233,000 conditioned on, *inter alia,* receiving an appraisal value for the Crawfords' house of at least $311,000. Signet then contacted Steele which arranged for Capitol to appraise the Crawfords' house. Capitol assigned the appraisal to Fenning who performed a "walkthrough" home-comparison appraisal and prepared a report dated April 8, 1994 that valued the house at $190,000.

Bass told the Crawfords the amount of the appraisal and asked for any information they had to support their representation that the house was worth $325,000. The Crawfords sent Bass two earlier appraisals: one dated August 23, 1990 for $304,000 and one dated August 10, 1993, for $340,000.[3]

Jack May, a senior appraiser at Signet, notified Steele of the disputed valuation and Steele informed Capitol, requesting a review of Fenning's appraisal. In a letter dated April 19, 1994

(citing rule *56(f)* to affirm denial *of* discovery extension where plaintiff "never stated concretely why she could not, absent discovery, present by affidavit facts essential to justify her opposition to [defendant's] summary judgment motion").

[3] The Crawfords did not mention two lower appraisals: one dated February 27, 1989 for $225,000 and one dated June 22, 1992 for $235,000.

Capitol reported that Fenning's estimate was "at the high end for the neighborhood" and concluded it "was justified and well supported." Appendix Exhibits (App. Exhs.) 46. On April 26, 1994 Steele informed May of the review of Fenning's appraisal and of the drive-by appraisal value. May "deferred to Capitol and Steele's conclusion that the Capitol appraisal was well-founded and that the 1990 and 1993 appraisals were not." *Id.* 339. Accordingly, he recommended to Piercy that Signet "should continue to rely on the Capitol appraisal." *Id.* 339-40. On May 4, 1994 Piercy notified the Crawfords that the loan was denied because of "[i]nadequate collateral." *Id.* 51.

The Crawfords filed this action on October 17, 1996. The second amended complaint (filed July 2, 1997) alleges seven counts: (1) racially discriminatory "redlining"[4] in violation of 42 U.S.C. § 1981; (2) conspiring to redline in violation of 42 U.S.C. § 1985(3); (3) negligent review of Fenning's appraisal by Signet; (4) negligent appraisal by Steele, Capitol and Fenning; (5) vicarious liability against Signet for Steele's and Capitol's negligence; (6) vicarious liability against Steele for Capitol's negligence; and (7) vicarious liability against Capitol for Fenning's negligence. App. Exhs. 75-87. The district court granted summary judgment in the defendants' favor in an unpublished memorandum and opinion filed April 16, 1998. The Crawfords appeal the court's judgment.

II.

"We review grants of summary judgment *de novo;* a party is only entitled to summary judgment if the record, viewed in

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[4] "Redlining" is "the practice of financial institutions intentionally not lending to certain neighborhoods or parts of a community." H.R. Rep. No. 104-193 at 177 (1995).

the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact." *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc). Applying this standard, we affirm the district court.

First, we conclude the Crawfords failed to make out a prima facie case of discrimination in violation of 42 U.S.C. § 1981 or § 1985(3). Under the familiar burden shifting scheme *of McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a prima facie case of discrimination requires a showing "that a qualified plaintiff who is a member of a protected class was disadvantaged in favor of a person who is not a member of the protected class." *Whitacre v. Davey*, 890 F.2d 1168, 1169-70 (D.C. Cir. 1989); *see, e.g., Kolstad v. American Dental Ass'n*, 108 F.3d 1431, 1436 (D.C. Cir. 1997) ("Where sex discrimination in promotion is alleged, a plaintiff proves her prima facie case by showing that she is female, that she was refused a position for which she applied and was qualified, and that the employer filled the position with a male."); *Paquin v. Federal Nat'l Mortgage Ass'n*, 119 F.3d 23, 26 (D.C. Cir. 1997) ("In the [Age Discrimination in Employment Act] context a complainant makes his required *prima facie* showing if he (i) belongs to the protected age group, (ii) was qualified for the position, (iii) was terminated and (iv) was replaced by a younger person."). Assuming the framework applies in a redlining case,[5] the Crawfords were

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[5] The Seventh Circuit has concluded the *McDonnell Douglas* framework is not "available" in a mortgage discrimination suit and that therefore a plaintiff in such a case is required to "try to show in a conventional way, without relying on any special doctrines of burden-shifting, that there is enough evidence, direct or circumstantial, of discrimination to create a triable issue." *Latimore*

required to show *inter alia* that they were "qualified" for the loan they were denied. *Accord Latimore v. Citibank, F.S.B.*, 979 F. Supp. 662, 665 (N.D. Ill. 1997) ("[I]n a case where the plaintiff alleges that her loan application was discriminatorily denied, she must prove (1) that she is a member of a protected class, (2) that she applied for and was qualified for a loan, (3) that the loan was rejected despite her qualifications, and (4) that the defendants continued to approve loans for applicants with qualifications similar to those of the plaintiff.") (citing *Thomas v. First Fed. Sav. Bank*, 653 F. Supp. 1330, 1338 (N.D. Ind. 1987); *Gross v. United States Small Bus. Admin.*, 669 F. Supp. 50, 52-53 (N.D.N.Y. 1987); *Bell v. Mike Ford Realty Co.*, 857 F. Supp. 1550, 1556 (S.D. Ala. 1994)). They failed to make such a showing. The Signet loan approval was by its terms contingent upon "[r]eceipt and review of satisfactory subject property appraisal to support a minimum fair market value of $311,000." Signet Supplemental App. at 11. The only appraisal report meeting this value requirement, the one dated August 24, 1993, was not "satisfactory" because, as the Crawfords acknowledged at oral argument, as of April 1994 it was eight months old and it had not been recertified by an appraiser within the previous four months as required by the Federal National Mortgage Association (Fannie Mae). *See* Fannie Mae Appraisal Guide § 201 (App. Exhs. 414-15) (providing "the property must have been appraised within the 12 months that precede the date of the note and mortgage" and when appraisal "will be more than four months old on the date of the note and mortgage," appraiser "must inspect the exterior of the property and review current market date" and

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v. Citibank, Fed. Sav. Bank, 151 F.3d 712, 715 (7th Cir. 1998). We need not resolve this issue here because, as we explain, assuming that the framework does apply, the Crawfords have failed to meet their burden under it.

provide a "certification" that "he or she believes that the property has not declined in value");[6] *see also* App. Exhs. 338-39 (affidavit of Jack May). Because there was no evidence before the district court of an appraisal satisfying the loan approval conditions, we conclude the Crawfords failed to show they were qualified for the loan they sought and therefore did not establish a prima facie case of discrimination.

The Crawfords also failed to produce evidence to support their remaining claims. As the district court correctly concluded, counts 3 and 4, alleging negligence by Signet, Steele, Capitol and Fenning, required expert testimony on the standard of care governing the appraisal profession. *See District of Columbia v. Hampton*, 666 A.2d 30, 35 (D.C. 1995) ("The plaintiff in a negligence action bears the burden of proving the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between that deviation and the plaintiffs injury. Furthermore, if the subject in question is so distinctly related to some science, profession, or occupation as to be beyond the ken of the average layperson, expert testimony is usually required to prove the standard of care.") (internal quotations omitted). None was offered. Further, because the Crawfords established no underlying negligence as alleged in counts 3 and 4, summary judgment was properly granted on counts 5 through 7 alleging vicarious liability for the negligence. "[V]icarious liability is not an independent cause of action, but rather is a legal concept used to transfer liability from an agent to a principal at trial." *Young v. 1st American Fin.*

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[6] The Crawfords agreed at oral argument that if appraisers followed the Fannie Mae guidelines, they would be "okay," that is nondiscriminatory.

Servs. 977 F. Supp. 38 (D.D.C. 1997). In the absence of agent liability, therefore, none can attach to the principal.

For the foregoing reasons, the judgment of the district court is

Affirmed.

APPENDIX D

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED APRIL 16, 1998

Civil Action No. 96-2398 (RMU)

GEORGE and HARRIET CRAWFORD, Plaintiffs,

v.

SIGNET BANK, ET AL., Defendants.

MEMORANDUM OPINION

Granting Defendants' Motions for Summary Judgment; and Granting Defendant Signet Bank's Motion to Strike in Part and Denying it Part;

I. Introduction

Plaintiffs George and Harriet Crawford, African-American homeowners, filed this action under Section 1981 and Section 1985(3) alleging race discrimination in the denial of their home loan application. The plaintiffs also alleged several common law claims, including negligence, professional malpractice, and vicarious liability. This matter comes before the court on three separate motions for summary judgment filed by defendants Signet Bank and Signet Mortgage (referenced collectively as "Signet Bank"); defendants Capitol Appraisal ("Capitol") and Stephen Fenning; and defendant Steele Software System Corporation ("Steele"). Upon consideration of the parties' submissions and the relevant law,

the court grants all three motions for summary judgment and dismisses the above-captioned action.

II. Background

In February 1994, defendant Signet Bank solicited the plaintiffs to refinance the first and second mortgages on their home. Subsequently, in March 1994, the plaintiffs submitted a Uniform Loan Application to Signet Bank for a loan in the amount of $233,000 at an interest rate of 7.35%. The plaintiffs also represented that their home was valued at $325,000. The plaintiffs' home would serve as collateral for the loan. This loan would allow the plaintiffs to consolidate their first and second mortgages into one loan. Signet Bank informed the plaintiffs that their home must appraise for at least $311,000 to qualify for the loan. In late March 1994, Connie Piercy of defendant Signet Bank underwrote the loan and conditionally approved the loan subject to receipt and review of a satisfactory property appraisal to support a minimum fair market value of $311,000.

Subsequently, defendant Signet Bank contacted defendant Steele to appraise the plaintiffs' home. Defendant Steele is an appraisal management company that assigns appraisal work to a network of independent appraisers throughout the United States. Defendant Steele in turn hired defendant Capitol to perform the actual appraisal of the plaintiffs' home. Defendant Stephen Fenning, one of defendant Capitol's employees at that time, was assigned the task of appraising the plaintiffs' property.

On April 4, 1994, defendant Fenning, using the Sales Comparison approach, determined that the plaintiffs' home was worth $190,000. Defendant Fenning arrived at this value by performing a walk-through examination of the plaintiff's

home and comparing it to other recent sales in close proximity to the plaintiffs' home. Defendant Capitol reported defendant Fenning's assessment to defendant Signet Bank, who in turn informed the plaintiffs. The plaintiffs, however, disputed this appraisal and forwarded to defendant Signet Bank two appraisals that valued the plaintiffs' property over $300,000. Specifically, the plaintiffs sent to defendant Signet Bank a 1992 appraisal which valued their home at $304,000, and an August 1993 appraisal which valued it at $340,000.

Both the plaintiffs' 1990 and the 1993 appraisals were then forwarded to Mr. Jack May, who was responsible for defendant Signet Bank's residential appraisals. Mr. May then notified defendant Steele of the plaintiffs' two appraisals. Defendant Steele in turn informed defendant Capitol of the plaintiffs' appraisals and requested that defendant Capitol review defendant Fenning's assessment for accuracy. Subsequently, on April 19, 1994, defendant Capitol confirmed to defendant Steele that defendant Fenning's appraisal of the plaintiffs' home at $190,000 was justified and well supported. As part of its general practice, defendant Steele then hired Mr. Michael P. DeChant, another independent appraiser, to conduct a "drive-by market analysis" appraisal of the plaintiffs' property. This appraisal methodology does not include the inspection of the property's interior. Mr. DeChant performed the drive-by appraisal and concluded that plaintiffs' home was worth only $145,000. This information was ultimately relayed to defendant Signet Bank. On May 4, 1994, based on the two appraisals of defendant Fenning and Mr. DeChant, defendant Signet Bank denied the plaintiffs' loan application because of inadequate collateral.

Because of the rejection of their loan application, the plaintiffs subsequently filed a seven-count complaint alleging

violation of 42 U.S.C. §§ 1981 and 1985(3) negligence, professional malpractice and vicarious liability. Specifically, Count I alleges that all defendants denied the plaintiffs' loan application based on their race in violation of Section 1981. Count 11 alleges that all defendants conspired to deprive the plaintiffs of their equal protection under the law of the United States in violation of 42 U.S.C. §1985(3) Count III alleges that defendant Signet Bank negligently processed the plaintiffs' loan application by relying on an appraisal that defendant Signet Bank knew significantly undervalued the property. Count IV alleges that defendants Steele, Capitol, and Fenning committed professional malpractice when defendant Fenning negligently appraised and undervalued the plaintiffs' home. Count V alleges that defendant Signet Bank was vicariously liable for the negligent appraisal of the plaintiffs' home performed by defendants Capitol and Fenning. Count VI alleges that defendant Steele was vicariously liable for defendants Capitol and Fenning because they negligently appraised the plaintiffs' property. Count VII alleges that defendant Capitol was vicariously liable for defendant Fenning's negligent appraisal of the plaintiffs' home.

III. Standard of Review

Fed. R. Civ. P. 56 (c) provides that, "summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c) Rule 56(c) mandates summary judgment if the non-movant fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp, v, Catrett, 477 U.S. 317, 322 (1986). In such a situation, no genuine issue of material fact

can exist since a failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial. Id. at 322-23. The moving party meets its burden if it illustrates that there is an absence of evidence to support the non-moving party's case. Id. at 325. The party opposing a motion for summary judgment may not rely on mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

IV. Discussion

A. Counts I & II: Claims Under Sections 1981 and 1985(3)

The plaintiffs allege that all defendants deprived the plaintiffs equal protection under the law by denying their loan application in violation of Section 1981, and that these defendants conspired to deprive the plaintiffs of these rights in violation of Section 1985(3) Section 1985(3). however, "provides no substantive rights itself, plaintiff[s] must show denial of 'the equal protection of the laws, or of equal privileges and immunities under the law," in violation of Section 198 1. Alder v. Columbia Historical Soc.,690 F. Supp. 9, 15 (D.D.C 1988). In order to prevail under Section 198 1, the plaintiffs must prove that defendants' actions were purposefully discriminatory and racially motivated. See Carney v. The American University, 960 F. Supp. 436, 439 (D.D.C. 1997). "The requisite 'discriminatory animus'... can be demonstrated through either direct or indirect evidence." Anderson v. Group Hospitalization, Inc., 820 F.2d 465, 467-68 (D.C. Cir. 1987).

The Title VII disparate-treatment framework, as articulated under McDonnell Douglas Corp. v. Green, 411 U.S. 793

(1973), applies to claims of race discrimination under Section 1981. Webb v. District of Columbia 864 F. Supp. 175, 185 (D.D.C. 1994). Under the McDonnell Douglas framework, the plaintiffs bear the initial burden of establishing by a preponderance of evidence a prima facie case of discrimination. Carney 960 F. Supp. at 439 The elements of a prima facie case vary slightly depending upon the specific type of discriminatory conduct alleged. Id. Therefore, in a case where the plaintiffs allege that their loan application was discriminatorily denied, they must show that (1) they belong to a protected class; (2) they applied for and were qualified for a loan; (3) that the loan was rejected despite their qualification; and (4) the defendants approve loans for applicants with qualification similar to those of the plaintiffs. Latimore v. Citibank. F.S.B., 979 F. Supp. 662, 655 (N.D. Ill. 1997). "Courts have held that summary judgment is appropriate under Section 1981 when a plaintiff fails to establish a prima facie case of purposeful discrimination.' Clifton Terrace Assoc., Ltd. v. United Technologies Corp., 728 F. Supp. 24, 31 (D.D.C. 1990) aff'd in part and vacated in part 929 F.2d 714 (D.C. Cir. 1991).

It is not disputed that the plaintiffs meet the first element because they are African-American homeowners. The remaining three elements, however, are highly contested. Defendant Signet Bank argues that it was not aware of the plaintiffs' race and that it denied the plaintiffs' loan application because of inadequate collateral, namely because of defendant Fenning's appraisal of the property at $190,000. The plaintiffs, on the other hand, maintain that because of racial animus the defendants "knowingly [approved] an appraisal on plaintiffs" home that was the product of redlining in violation of 42 U.S.C. §1981."[7] Because the last three elements of the

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[7] Plaintiffs' Opposition at 7.

prima facie case are intertwined the plaintiffs have the burden of demonstrating that the defendants "treated (them] materially differently than similarly situated white loan applicants or loan applicants from non-minority neighborhoods." Latimore, 979 F. Supp. at 655.

In this case, there is no evidence in the record to indicate that the defendants treated the plaintiffs differently from other white homeowners who were similarly situated. The plaintiffs maintain that despite their notice to defendant Signet Bank that their home was worth more than $190,000, "Signet conspired with Steele and Capitol to use Fenning's negligent performance of the appraisal as the basis for intentionally discriminating against plaintiffs."[8] The plaintiffs' depositions, however, undermine their claims of race discrimination. Plaintiffs George and Harriet Crawford were deposed separately. Mrs. Crawford testified in her deposition that she could not detect any discriminatory conduct with regard to defendant Fenning's appraisal of their home.[9] Mr. Crawford testified that he could not identify any evidence showing that the defendants processed the plaintiffs' loan application differently from similarly situated white homeowners.[10] Mr. Crawford also testified that defendant Signet Bank made every effort to try to get them a mortgage with Signet.[11] Furthermore, the plaintiffs' expert witness, Dr. Calvin P. Bradford, testified that he did not have any evidence to show that the defendant intentionally discriminated against the plaintiffs in denying their loan application.[12] Moreover, the plaintiffs fail to point to any evidence in the record showing

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[8] Plaintiffs' Opposition at 45.

[9] Transcript of Jane Doe's Deposition at 110.

[10] Transcript of John Doe's Deposition at 152.

[11] Id. at 38.

[12] Transcript of Dr. Calvin Bradford's Deposition at 257-58.

that the defendants were inconsistent in processing loan applications depending on the race or neighborhood of the homeowners. Specifically, the plaintiff does not proffer any evidence to demonstrate that they were treated differently from other similarly situated white loan applicants. Under these facts, the court concludes that the plaintiffs failed to establish a prima facie case of intentional discrimination, a requisite for claims under Section 198 1, and thus grants summary judgment in favor of the defendants on plaintiffs' claims under Section 1981 and Section 1985(3).

B. Counts III & IV: Claims of Negligence and Professional Malpractice

Count III alleges that defendant Signet Bank owed a duty to the plaintiffs to review the appraisal it had ordered with the level of care and skill that the average financial institution would have exercised. The plaintiffs assert that defendant Signet Bank breached that duty by denying plaintiffs' mortgage loan application on the sole basis of an appraisal that defendant Signet Bank knew grossly undervalued the fair market value of plaintiffs' home.[13] Count IV alleges that defendants Steele, Capitol, and Fenning breached their duty to perform an appraisal of the plaintiffs' home with the skill and competency of a licensed appraiser in the District of Columbia acting under similar circumstances.[14] It is undisputed that the profession of residential appraisal requires technical knowledge outside the realm of a layperson's common knowledge. Indeed, the performance of residential appraisal is governed by D.C. Code §§ 45-3201-3203. In this regard, it is well settled law that in cases alleging negligence and professional malpractice, as

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[13] Plaintiffs' Opposition at 8.

[14] Plaintiffs' Opposition at 8.

here, the plaintiffs bear the burden of establishing "the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between the deviation and the plaintiff's injury.' District of Columbia v. Hampton, 666 A.2d 30, 35 (D.C. 1995) (quoting Meek v. Sheard 484 A.2d 579, 581 (D.C. 1984)); see also District of Columbia v. Shannon, 696 A.2d 1359, 1365 (D.C. 1997). Moreover, "'if the subject in question is so distinctly related to some science, *profession, or occupation as to be beyond the ken of the average layperson:, expert testimony is usually required to prove the standard of care."* Hampton, 666 A.2d 30 at 35 (quoting District of Columbia v. Peters, 527 A.2d 1269, 1273 (D.C. 1987)) (emphasis added).

In the present case, the plaintiffs failed to produce an expert witness who could testify to the applicable standard of care defendant Signet Bank should have adhered to when evaluating defendant Fenning's appraisal in connection with the plaintiffs' loan application. The plaintiffs also failed to provide expert testimony on what standard of care defendants Steele, Capitol, and Fenning should have employed when appraising the plaintiffs' home. Indeed, the plaintiffs, in a wholly conclusory fashion, claim that defendant Signet Bank negligently reviewed defendant Fenning's appraisal, and that defendant Fenning negligently appraised the plaintiffs' home and thus undervalued its fair market value. The plaintiffs, however, failed to designate an expert witness who could testify that the conduct of defendants Signet Bank and Fenning fel below the applicable standard used in the residential appraisal industry.

In their opposition to the defendants' motions for summary judgment, the plaintiffs put forth two expert witnesses; however, neither of them address the applicable standard of care in this case. One of the plaintiffs' expert witnesses, Mr.

John E. May, Jr., testified only about the damages the plaintiffs incurred as a result of the denial of the loan application. Specifically, Mr. May's affidavit states that "[m]y testimony is limited to the calculation of the monies paid by the Plaintiffs ... from the time residential mortgage loan application was denied by Signet Bank ... on May 4, 1994, for inadequate collateral, through October 1, 1997."[15] Mr. May's testimony does not discuss what applicable standard of care the defendants should have employed in appraising the plaintiffs' home and in reviewing the appraisal itself, and whether the defendants deviated from that standard. The second expert witness, Dr. Calvin Bradford, offers a statistical analysis of defendant Signet Bank's lending practices based on data submitted by defendant Signet Bank under the Home Mortgage Disclosure Act. Dr. Bradford's affidavit fails to discuss whether defendants Signet Bank, Steele, Capitol and Fenning conducted themselves below the standard of care expected of those in the profession of residential appraisal. Specifically, the affidavit neither describes the acceptable procedure which defendant Signet Bank should have adhered to when reviewing the appraisal, nor the appropriate methodology that defendant Fenning should have employed in appraising the plaintiffs' home.

In a final attempt to proffer evidence of a breach of the applicable standard of care, the plaintiffs submitted an affidavit of Mr. Howard L. Popkin, which criticizes defendant Fenning's appraisal of the plaintiffs' home. The plaintiffs, however, conceded that "Howard Popkin did not enter this proceeding as an expert witness for the Plaintiffs nor have the Plaintiffs designated him as their expert."[16] To the extent that

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[15] John E. May, Jr., Affidavit at 1.

[16] Plaintiffs' Opposition to Motion to Strike at 6.

the plaintiffs attempt to designate Mr. Popkin as an expert witness in this case, the designation is untimely, and consequently, Mr. Popkin's affidavit is stricken from the record.[17] Since the plaintiffs failed to produce an expert

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[17] Signet Bank moved to strike several items from the plaintiffs' opposition, including an affidavit of Mr. Howard Popkin Defendant Signet Bank argues that the plaintiffs failed to designate Mr. Popkin as an expert witness within the time provided by this court's Scheduling Order, and therefore, should be stricken from the record. Specifically, defendant Signet Bank contends that the court's August 28, 1997 Scheduling Order made clear that plaintiffs' Rule 26(a)(2)(B) expert witness statements were due on or before October 14, 1997. On that date, the plaintiffs designated Mr. John May, Jr., and Dr. Calvin Bradford as their expert witnesses. The plaintiffs, however, did not designate Mr. Popkin as an expert witness in this case. To date, the plaintiffs have not submitted a Rule 26(a)(2) report on Mr. Popkin. The first time Mr. Popkin's affidavit surfaced was in the plaintiffs' opposition to the defendants' motion for summary judgment. The plaintiffs nevertheless seek to rely on Mr. Popkin's opinion as setting forth the alleged standard an appraiser should have followed in performing an appraisal of the plaintiffs' home and as evidence that defendant Fenning failed to adhere to that standard in performing his April 1994 appraisal.

Under Fed. R. Civ. P. 37(c)(1), a party, without substantial justification, is automatically precluded from using expert witnesses or evidence that violates the disclosure requirements under Fed. R. Civ. P. 26(a). See 7 Moore's Federal Practice, § 37.60[1]-[2] (Matthew Bender 3d ed.) To the extent that the plaintiffs attempt to designate Mr. Popkin as an expert witness, it is untimely, therefore, the court strikes the Popkin Affidavit from the record. Accordingly, the court grants defendant Signet Bank's motion to strike the Popkin Affidavit. With regard to the remaining exhibits which defendant Signet Bank seeks to strike, the motion is denied.

witness who could testify to the applicable standard of care in a negligence and professional malpractice suit, the court must dismiss the plaintiffs' Counts III and IV for failure to satisfy the threshold burden of establishing the applicable standard of care.

C. Counts V-VII: Claims on Vicarious Liability

Counts V, VI and VII allege that defendants Signet Bank, Steele, and Capitol are vicariously liable for defendant Fenning's negligent appraisal of the plaintiffs' property. These claims are meritless because the plaintiffs fail to establish the underlying negligence claim. "Vicarious liability is not an independent cause of action, but rather is a legal concept used to transfer liability from an agent to a principal." Young v. First American Financial Serv., 977 F. Supp. 38, 41 (D.D.C. 1997). Thus, "vicarious liability may be imposed upon a non-negligent person by reason of some closely integrated relationship existing between him and the negligent party." Amoco Oil Co. v. EPA, 543 F.2d 270, 276 (D.C. Cir. 1976). A finding of negligence on the part of the agent, therefore, is a necessary element to finding vicarious liability on the part of the principal. In this case, without deciding whether a principal-agency relationship exists between defendant Fenning and the various defendants, the court dismisses the plaintiffs' claims of vicarious liability for failure to establish negligence. As mentioned above, a prerequisite to establishing negligence is proof that defendant Fenning deviated from the applicable standard used in residential appraisals. Lacking expert testimony to establish the governing standard of care, the plaintiffs' claim of negligence, along with its derivative claims of vicarious liability, collapses. Accordingly, the court grants summary judgment in favor of the defendants on Counts V, VI, and VII.

V. Conclusion

For the reasons stated above and articulated at the Status Hearing held on April 6, 1998, the court grants the three motions for summary judgment and dismisses the above-captioned motion with prejudice.

Accordingly, it is this 16th day of April, 1998,

SO ORDERED.

A separate Order for Entry of Judgment accompanies this Memorandum Opinion.

/s/ Ricardo M. Urbina
UNITES STATES DISTRICT JUDGE

APPENDIX E

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED APRIL 16, 1998

Civil Action No. 96-2398 (RMU)

JOHN and JANE DOE,
Plaintiffs,

v.

SIGNET BANK, ET AL.
Defendants.

ORDER

In accordance with the court's Memorandum Opinion issued on the 16th day of April, 1998, and for the reasons articulated at the Status Hearing held on April 6, 1998, it is this 16th day of April, 1998,

ORDERED that the motion for summary judgment filed by defendants Signet Bank and Signet Mortgage be and is hereby **GRANTED;** it is

FURTHER ORDERED that the motion for summary judgment filed by defendants Capitol Appraisal and Stephen Fenning be and is hereby **GRANTED;** it is

ORDERED that the motion for summary judgment filed by defendant Steele Software System Corporation be and is hereby **GRANTED**; it is

FURTHER ORDERED that the plaintiffs' "counter-motion for summary judgment" be and is hereby **DENIED** as moot;[1] it is

ORDERED that the motion to strike cross-summary judgment motion filed by defendants Signet Bank and Signet Mortgage be and hereby **DENIED** as moot; it is

FURTHER ORDERED that the motion to strike expert affidavits and other inadmissible exhibits filed by defendants Signet Bank and Signet Mortgage be and is hereby **GRANTED** in part and **DENIED** in part; it is

ORDERED that the plaintiffs' motion for leave to file memorandum in support of their opposition to defendants' motion for summary judgment be and is hereby **GRANTED**; and it is

FURTHER ORDERED that the motion for leave to file a reply filed by defendant Steele Software System Corporation be and is hereby **GRANTED**.

SO ORDERED.

/s/ Ricardo M. Urbina
United States District Judge

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[1] The plaintiffs subsequently withdrew their "counter-motion for summary judgment."

APPENDIX F

AFFIDAVIT
OF
HOWARD L. POPKIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION NO. 96-2398 (RMU)

GEORGE AND HARRIET CRAWFORD
Plaintiffs,

v.

SIGNET BANK, et al.,
Defendants

AFFIDAVIT OF HOWARD L. POPKIN

I, Howard L. Popkin, do hereby depose and state as follows:

1. I am a professional appraiser and have been so employed for more than twenty (20) years. I perform appraisals in the Washington Metropolitan area under the business name of Appraisal Services Company. Prior to becoming a full-time appraiser I was a licensed real estate broker. I was deposed in this proceeding on December 9, 1997, and have also testified as an expert witness numerous times on the value of properties in the Washington Metropolitan area.

2. From 1976 through 1996 I have performed hundreds of appraisals in the District of Columbia. The peak period

for my performance of appraisals in the District of Columbia was during the period of 1992 through 1994. I am very familiar with the District housing market and the unique characteristics of the market area.

3. The District of Columbia market was and is involved in regentrification and the rehabilitation of property. It is my professional experience that you have houses in the same block that can double or triple in value from one end of the row to the next because of the rehabilitation that occurs when people fix up their property to make a better home.

4. I am very familiar with the LeDroit Park neighborhood that has experienced a lot of rehabilitation. There are blocks in LeDroit Park where the owners have substantially rehabilitated the properties and these properties are comparable to properties in the DuPont, Logan Circle, and Kalorama neighborhoods.

5. The 2300 block of First Street, N.W. is a block where there has been a lot of rehabilitation. There are properties in this block that have been rehabilitated and are unique to the LeDroit Park neighborhood. If there are no recent sales of these rehabilitated properties you cannot get an accurate indicator of the value of these properties from using other properties in the LeDroit Park neighborhood as comparables.

6. I performed an appraisal of 2302 First Street, N.W. on August 10, 1993 and determined the fair market value of this property to be $340,000. This property had been extensively renovated by the owners and there were no recent sales within the LeDroit Park neighborhood that were comparable. In order to find similar houses that were comparable I was required to locate comparable properties in areas where the houses were similar.

7. Appraisers who are experienced in the District of Columbia market are aware that if the house being appraised does not have recent similar sales in its neighborhood, the acceptable standard is to go to a similar neighborhood that would be an alternative choice for a prospective buyer of the subject property. The standard is to locate comparables in a similar neighborhood and the distance from the subject, although a factor, is not the primary concern. The primary concern is to locate comparable properties.

8. The subject property 2302 First Street, N.W. is located in a well known neighborhood where every experienced District of Columbia appraiser has difficulty in finding adequate data. Within the Le Droit Park neighborhood there are three (3) blocks of First Street, N.W., from the 2200 block to the 2400 block, in which there have been acquisitions and superior renovations of three (3) story houses that have never shown up in the Multiple Listing Service (MLS) as sold. The owners purchased and rehabilitated these properties with the intent of permanent residency, not speculation.

9. I was requested to give an opinion on the April 8, 1994, appraisal performed by Stephen F. Fenning for Signet Mortgage Corporation on 2302 First Street, N.W. I have reviewed the data on the comparable properties selected and used by Mr. Fenning in performing his appraisal. It is my expert opinion that the comparable properties selected by Mr. Fenning located at: 916 T Street, N.W., 914 Westminster Street, N.W., and 2112 First Street, N.W. were not the best available comparable to 2302 First Street, N.W.

10. For example, it is not common practice to compare the property located at 916 T Street, N.W. with 2302 First Street, N.W. In this regard, Mr. Fenning noted on the MLS data sheet for 916 T Street, N.W. that this property was

"renovated in the 70's, beat up around the edges, needs hardwood floors, bath and kitchen needs work, the renovation in the 70's took the character out of the house, needs paint and touch up work."

11. Mr. Fenning's description of 2302 First Street, N.W. in the "ADDENDUM" to his appraisal is that:

Since the current owners purchased the subject in 1984, they have made extensive improvements. Much of the original detail of the property has been retained including wide staircases, intricate woodwork around the fireplaces and walls, hardwood floors and high ceilings. The current owners have renovated and refurbished these while bringing the house up to modern day standards in regards to heating/cooling, plumbing and electrical. The current owners have also finished off the basement including a rec room, half bath and wet bar. Although the property has been improved since its latest purchase, the improvements have not been a complete "gut" renovation and the property is considered to be in average condition in reference to other properties in the neighborhood.

From the description of these properties, 916 T Street, N.W. had not been rehabilitated and 2302 First Street, N.W. had been extensively renovated. The property at 916 T Street, N.W. was not comparable.

12. The Fannie Mae guidelines require that a minimum of three (3) comparables be reported; this property was not the best available. The same is true with 914 Westminster Street, N.W. and 2112 First Street, N.W. (which is substantially smaller). Therefore, the properties reported on the Fenning appraisal were not comparable.

13. The review appraiser should have detected these problems had he properly performed the review of the Fenning appraisal and looked at the comparables selected and data used by Fenning to reach his estimate of fair market value.

14. In addition, the owners of 2302 First Street, N.W. were not given credit for the extensive rehabilitation and renovation to their property.

15. When I performed my August 10, 1993, appraisal on 2302 First Street, N.W., I noted that the house had been "gutted" prior to the rehabilitation, there were refinished hardwood floors, and the property was in superior condition compared to other properties in the Le Droit Park neighborhood, not average as Fenning concluded.

16. In addition, it is my professional opinion that an appraiser can not perform an accurate appraisal of the value of 2302 First Street, N.W. by looking at the exterior.

17. Also, when there is a dispute as to the estimated fair market value of an appraised property in the District of Columbia, especially in the 2200 to 2400 blocks of First Street, N.W., it would not be an acceptable standard nor appropriate to perform a "drive-by-market analysis."

18. A "drive-by-market analysis" may be an appropriate standard for estimating fair market value in markets where all the houses were constructed by the same contractor, during the same period of time, and using the same general floor plan.

19. I have also reviewed the documentation associated with the "drive-by-market analysis" performed by Michael P.

DeChant and Associates, Inc. I note that the comparables listed are inferior to 2302 First Street, N.W. These comparables as applied could not be used as accurate indicators of value.

20. In addition, the form used for the "drive-by-market analysis" is not the preferred form for the appraising industry for the first and second refinance mortgage loan applied for by the Crawfords from Signet Mortgage Corporation. The form used by Michael P. DeChant and Associates, Inc., as indicated on the front is limited to **"Second Mortgage Property Value Analysis Report."** It is also noted on the front that **"This form may be used if the second mortgage will not exceed $15,000 and the value is based on "as is" condition."** Failure to view the interior of 2302 First Street, N.W. would put the appraiser at a disadvantage in this situation in trying to determine fair market value.

21. Clearly the use of this Freddie Mac Form 704 is not an acceptable standard for the appraisal industry in the transaction the Crawfords were involved in with Signet and was not intended for this use.

22. In conclusion it is my opinion that the methods used in the two (2) above referenced reports failed too take into consideration the vital factors of interior renovation and restoration and therefore failed to accurately reflect fair market value.

I declare, under penalty of perjury, that the foregoing is true and correct upon my personal knowledge and belief.
Executed on February 23, 1998

/S/ Howard L. Popkin
Howard L. Popkin
14007 Gallop Terrace
Germantown, MD 20876

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Petitioners' " Petition for a Writ of Certiorari," were served by first class mail, postage prepaid, this 22nd day of November, 1999 upon:

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George W. Crawford

Supreme Court, U.S.
FILED
DEC 22 1999
CLERK

(2)

No. 99-878

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE W. CRAWFORD and HARRIET CRAWFORD,

Petitioners,

vs.

SIGNET BANK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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26pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether in the absence of any direct evidence of discrimination, a loan applicant must come forward with evidence that he satisfied a lender's non-discriminatory lending criteria and thus was qualified for the loan in order to state a prima facie case of lending discrimination under 42 U.S.C. §§ 1981, 1985(3).

2. Whether under District of Columbia law, expert testimony is required to determine whether a lender has failed to abide by reasonably prudent lending standards or reasonably prudent appraisal standards.

3. Whether a trial court may in its discretion strike an affidavit of an expert witness used in opposition to a summary judgment motion after close of discovery where the party tendering the affidavit has not previously identified the expert or provided an expert report in accordance with the trial court's scheduling order.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondents Signet Bank and Signet Mortgage Corporation are affiliated with First Union Corporation, a publicly traded company. Signet Bank has been merged into First Union National Bank, which is a subsidiary of First Union Corporation. Signet Mortgage Corporation is a subsidiary of First Union National Bank.

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STATEMENT OF THE CASE

This case arises from Respondent Signet Mortgage Corporation's denial of a mortgage loan to Petitioners George and Harriet Crawford to refinance the indebtedness on their home. The Crawfords' Second Amended Complaint (the "Complaint") alleges race discrimination under 42 U.S.C. §§ 1981, 1985(3) (Counts I and II); negligence against Signet Mortgage and its parent Signet Bank (Count III); [1] and negligence against the independent appraisers who appraised the Crawfords' home (Count IV). The Crawfords also allege vicarious liability of Signet Mortgage and Signet Bank for the alleged negligence of the outside appraisers (Count V) and vicarious liability of the appraisers for one another (Counts VI and VII).

In 1994, Signet Mortgage contacted the Crawfords and urged them to apply for a mortgage loan to refinance the indebtedness on their home. Ultimately, Signet Mortgage did not make the loan because the appraisal on the home came in too low. The appraisal was performed by Respondents Capitol Appraisal Service, Inc. and Stephen Fenning, independent appraisers with no affiliation with Signet Mortgage or Signet Bank. The Crawfords argue that it was discriminatory for the appraisers, in valuing the house, to use as comparables the sales of properties in or near the Crawfords' neighborhood of LeDroit Park, while not using sales of properties located further away in Kalorama or Dupont Circle. The Crawfords also argue that Signet Mortgage was mistaken in relying upon the Capitol appraisal, and not deferring to two outdated appraisals that

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[1] In November 1997, Signet Bank was merged into First Union National Bank, after this suit was filed.

the Crawfords tendered, notwithstanding Capitol's advice that the other two appraisals were flawed.

Following discovery, the District Court granted motions for summary judgment in favor of Signet Mortgage, Signet Bank, Steele, Capitol and Fenning. The Court of Appeals for the District of Columbia Circuit affirmed the trial court's decision. *Crawford v. Signet Bank*, 179 F.3d 926 (D.C. Cir. 1999). On August 23, 1999, the Court of Appeals denied the Crawfords' motion for rehearing or rehearing en banc.

STATEMENT OF FACTS

Although there are no material facts in genuine dispute below, Petitioners' recitation of the record is filled with misstatements. Accordingly, it is necessary for Respondents to recite the facts in detail. Sup. Ct. R. 15.2.

A. Signet Mortgage Solicits The Crawfords In 1994.

In 1994, Signet Mortgage made and sold residential mortgage loans. The Crawfords are African American homeowners residing at 2302 First Street, N.W., in the LeDroit Park neighborhood of the District of Columbia. Mr. Crawford is an attorney.[2/]

According to the Crawfords, in February of 1994, Lonnie Bass of Signet Mortgage contacted them three times by telephone in an attempt to convince them to apply for a loan to refinance their home mortgages. At the time, the

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[2/] The Crawfords were represented in succession by two different law firms. On appeal, Mr. Crawford now represents his wife and himself.

Crawfords had a first mortgage and a more recent second mortgage, taken out in August of 1993. Bass told the Crawfords that to consolidate their existing mortgages, the Crawfords would need a $233,000 loan, and that, accordingly, the property securing the mortgage (i.e., the Crawfords' house) must have a market value of about $311,000.

The Crawfords then provided Bass with information over the telephone to begin processing the loan, including a representation that the house was worth $325,000. There is no evidence that Bass or anyone else knew of the Crawfords' race before the Crawfords were told that they needed to show a market value of $311,000. Nor do the Crawfords have any quarrel with Bass. Mr. Crawford testified that "Mr. Bass . . . was very professional [and] made every effort . . . to try to get us a mortgage."

The minimum necessary appraised value was dictated by Signet Mortgage's written underwriting guidelines. Under these guidelines, the loan the Crawfords sought was deemed a "cash-out" refinancing because funds would be used to pay off the 1993 second mortgage, which was less than 12 months old at the time. Signet Mortgage's underwriting guidelines specified that a $233,000 loan of this type could have a maximum "loan-to-value" ratio of 75%.[3/] Thus, in order to qualify for a $233,000 loan, Signet Mortgage's underwriting guidelines required an appraised value of $311,000. There is no evidence that Signet Mortgage

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[3/] There is no evidence in the record that Signet Mortgage required a 71% loan-to-value ratio, described on page 15 of the Petition. Nor is there any evidence as to what neighborhood their telephone number is assigned.

applied this standard differently with respect to any applicant. According to Signet Mortgage's then head underwriter, who herself is African American, this 12 month rule applied to all applicants.

The Crawfords' allege that Signet Mortgage changed the loan from "no cash out" -- which the Crawfords assert would have permitted a 95% loan-to-value requiring a $245,000 appraisal -- to "cash out" because of the Crawfords' race. This did not happen. An internal memo, dated March 12, 1994, mistakenly designated the Crawfords' loan as "no cash out" before Signet Mortgage learned that the second mortgage was less than 12 months old. The March 14, 1994 credit report is the first information indicating that part of the debt that the Crawfords were refinancing was less than 12 months old, thereby requiring the Crawfords' loan to be deemed a cash out. In turn, a "cash out" loan required a maximum loan-to-value ratio of 75%.[4] There is no evidence in the record that Signet Mortgage knew of the Crawfords' race or the racial composition of their neighborhood at this time.

After the Crawfords provided various information, Connee Piercy of Signet Mortgage underwrote the loan. Piercy conditionally approved the loan in March of 1994, subject to certain conditions, including "[r]eceipt and review of [a] satisfactory subject property appraisal to support a minimum fair market value of $311,000." Signet Mortgage's

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[4] There is also no evidence in the record that the internal March 12, 1994 document was ever provided to the Crawfords at the time of the loan application, that the Crawfords discussed a 95% loan-to-value ratio with Signet Mortgage, or that the Crawfords were told that the loan would be a "no cash out" loan.

underwriting guidelines, in turn, required that this appraisal conform to Fannie Mae guidelines. Piercy was in Baltimore. She had no direct contact with the Crawfords, and did not know their race or the racial composition of their neighborhood.

Bass then sent the Crawfords a typed loan application, dated March 21, 1994, and a letter of confirmation, dated March 24, 1994, to sign. The Signet Mortgage confirmation letter stated that the Crawfords' application for a $233,000 loan was approved "subject to the general and special conditions stated herein." One "special condition" listed was "[r]eceipt and review of a satisfactory subject property appraisal to support a minimum fair market value of $311,000."

B. <u>Signet Mortgage Contacts Steele For An Appraisal.</u>

During 1994, Signet Mortgage utilized Respondent Steele Software Systems Corporation for appraisals. Steele provided outsourcing appraisal services to lenders throughout the United States. Steele, in turn, arranged for Capitol to perform the actual appraisal of the Crawfords' home. Capitol picked Fenning, a licensed and experienced appraiser, to do the work.[5/]

[5/] Between 1991 and 1994, Fenning performed approximately 1,000 appraisals for Capitol, 300 to 500 of which were in D.C. The Petition is full of irrelevant, unsupported attacks on Fenning. For instance, the record does not support the Crawfords' assertion that Fenning did not know D.C. neighborhoods or quadrants. Moreover, as the Crawfords conceded below, there are five expert appraisers in this case who give April 1994 values similar to those of Fenning, or who have reviewed the Fenning appraisal and have found it acceptable. <u>No</u> appraiser has given a materially higher value under oath. All of the

On or about April 8, 1994, Fenning appraised the Crawfords' home at $190,000 after completing a thorough walk-through examination of the home, asking questions about various improvements to the home, and researching various records to compile information about recent sales in the area around the home. Fenning's appraisal cited three recent sales in close proximity to the Crawfords' home as support for his determination. After finding these recent sales, Fenning made various adjustments to the sales prices of those comparables to extrapolate what the probable sales price for the Crawfords' house would be.

In some instances, the comparables had more valuable features, requiring a downward adjustment to the sales price in order to predict the probable sales price of the Crawfords' house. In other instances, the comparables had less valuable features, requiring a upward adjustment.[9/] Fenning did not know the loan amount or the values the Crawfords or others ascribed to the Crawford house.

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appraisers are not on a "approved list." Moreover, for what it is worth, two of the appraisers in this case upon whose testimony Respondents rely are African American.

9/ Thus, for example, Fenning added $10,000 to the sales price of one comparable to account for the fact that the comparable was renovated in the 1970's, whereas the Crawfords' house was renovated more recently in the 1980's. Fenning did not assume that the Crawfords' house was worth the same as another house in the neighborhood, where that house was in worse condition than the Crawfords', as the Crawfords now incorrectly suggest.

C. Respondents Review The Fenning Appraisal.

Bass informed the Crawfords of Fenning's determination, and asked them to supply any information to support their earlier representation that the home was worth $325,000. According to Mr. Crawford, Bass initiated the request. At that time, the Crawfords possessed a number of appraisals that had been performed on their home, including:

(1) a 1989 appraisal at $225,000;
(2) a 1990 appraisal at $304,000;
(3) a 1992 appraisal at $235,000; and
(4) an August 1993 appraisal by one Howard Popkin at $340,000.[7/]

The Crawfords sent the 1990 and 1993 Appraisals to Bass. The Crawfords did not send the 1992 Appraisal or alert Signet Mortgage that they possessed another appraisal that was, in fact, consistent with the Fenning appraisal, and significantly under $300,000. Nor did the Crawfords send the 1989 Appraisal or their personal analysis of their home's value or the value of the post 1989 improvements.

The 1990 and 1993 Appraisals were routed to Jack May, a senior appraiser at Signet Mortgage. May, like Piercy, was

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7/ The 1990 and 1993 Appraisals were performed for high cost, lower balance second mortgages made by non-bank lenders that were neither federally regulated banks nor otherwise subject to the appraisal requirements of Title XI of the Federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). In contrast, the 1992 Appraisal was performed for a first mortgage loan in a "[f]ederally [r]elated [t]ransaction[]," in accordance with the appraisal requirements of FIRREA. The 1992 loan wound up in the servicing portfolio of First Union Bank.

located in Baltimore, and was unfamiliar with values in D.C. Like Piercy, May had no direct contact with the Crawfords, and did not know either their race or the racial composition of their neighborhood. May forwarded the appraisals to Steele with a request to review the matter. In turn, Steele asked Capitol to do the same.

Capitol reviewed the Fenning appraisal and the other earlier appraisals, and concluded that Fenning's determination of fair market value was reasonable. Capitol indicated in a letter, dated April 19, 1994, that Fenning's

> estimate of market value situates the [Crawfords' home] at the high end [of value] for the neighborhood . . .. The comparables used in our report are all located within .5 miles of the subject [home] and are within 6 months of the appraisal date.

With regard to the 1993 Appraisal, Capitol noted that

> the estimated market value of the [1993] report is not supported by the sited comparables. The predominate value range [of sales] for the subject's neighborhood is $50,000 - $250,000. The comparables [relied upon by Mr. Popkin] are located 1-2 miles away . . . in superior neighborhoods where the predominate value range is significantly higher. (Dupont $200,000-$600,000; Kalorama $300,000-$2,000,000). A

location adjustment [based upon these differences] was not made . . . [despite being] warranted.[8/]

Thus, Capitol informed Steele "that the estimated market value of $190,000 is justified and well supported." An expert appraiser later retained by the Crawfords, Gaylord Curry, had less kind words for the Crawfords' 1990 and 1993 Appraisals, concluding not only that the 1990 and 1993 Appraisals were flawed, but that the 1993 Appraisal "bordered on fraud."

As a quality control measure -- and at its own expense -- Steele ordered a limited, or "drive by," appraisal of the Crawfords' home by another independent appraiser before responding to Signet Mortgage's inquiry. The new appraisal confirmed Fenning's conclusions.[9/]

Thereafter, Steele wrote a letter to May, dated April 26, 1994, outlining efforts undertaken by Capitol and Steele to review Fenning's market value determination, and enclosing a copy of the April 19, 1994 letter from Capitol. Based upon the information from Steele and Capitol, May deferred to

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[8/] The Crawfords imply that the word "superior" is a synonym for white. However, "superior" simply means more expensive. Gaylord Curry, the appraiser hired as an expert by the Crawfords, used the term "superior" in his April 28, 1997 letter to the Crawfords' counsel to describe Dupont Circle and Kalorama. Mr. Curry is African American. Similarly, Gaddie Jenkins, the author of the 1990 Appraisal upon which the Crawfords rely, uses the word "superior" in comparing neighborhoods. Mr. Jenkins is also African American. The Fenning Appraisal, in fact, does not use that word.

[9/] Crawfords' own experts testified that it is not standard practice to order an new appraisal, but it is common for a drive-by appraisal to be conducted to ball park the accuracy of a previous appraisal.

Steele and Capitol's conclusion that the Fenning appraisal was well-founded and that the 1990 and 1993 Appraisals were not. May reported back to the underwriter that Signet Mortgage should rely on the Fenning appraisal.

In turn, underwriter Piercy relied on May's advice. On or about May 4, 1994, Piercy denied the Crawfords' loan application for inadequate collateral. The Crawfords thereupon received notification from Signet Mortgage that the application had been denied for inadequate collateral.

In short, there is no evidence that it was unreasonable -- much less reckless, grossly negligent or an error too obvious to be unintentional -- for May and Piercy to have relied upon the judgment of outside appraisers that Signet Mortgage has regularly employed over 5000 times without incident, instead of deferring to what appeared to be suspect appraisals tendered by the Crawfords. Gaylord Curry, the expert appraiser later retained by the Crawfords themselves, concluded simply by looking at the 1990 and 1993 Appraisals that the appraisals were inflated and that the 1993 Appraisal "bordered on fraud." The Crawfords have thus failed to present any evidence that Signet Mortgage's legitimate business reasons for refusing to make the loan are not worthy of credence.

D. Signet Mortgage Lends On Or Near The Crawfords' Street In 1994.

Throughout 1994, Signet Mortgage approved at least six mortgage loans to African American borrowers on the Crawfords' street and/or close to the Crawfords' home. The Crawfords' application was the only application denied by Signet Mortgage in 1994 in D.C. for which Mr. Fenning or

Capitol performed an appraisal. On other occasions in 1994, Signet made loans to African Americans relying on Capitol/Fenning appraisals.

E. Bradford Concedes His Statistics Prove Nothing.

The Crawfords belatedly attempted to introduce statistics through an affidavit of one Calvin Bradford to argue that Signet Mortgage was more likely to deny loans to minority applicants. The Bradford Affidavit is based upon statistics submitted, pursuant to the federal Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. § 2801, et seq.[10/] Bradford himself conceded in the same breath that none of these numbers prove discrimination:

> These data do not provide all the relevant data . . . needed to compare similarly situated applicants or that would be required to determine the legitimacy or fairness of the outcomes of refinance applications. . . . [T]hey do not prove discrimination.[11/]

[10/] The Crawfords also make baseless accusations about missing data on the race of 51 applicants. As is apparent from the application in this case, an applicant need not disclose race. Where a lender is soliciting applications by telephone, which occurred here, the lender cannot determine the applicant's race without such help.

[11/] Moreover, Bradford did not attempt to perform any test for statistical relevance, as required.

F. The Lawyers' Committee Report Concedes Its Statistics Prove Nothing.

The Report by the Washington Lawyers' Committee cited by the Crawfords has no evidentiary value for the same reason. While the Report purports to control HMDA data for income, it does not purport to take into account credit history, i.e. number of late payments, amount of debt or amount of assets. These are essential credit characteristics upon which every lender underwrites a loan. For this reason, the Lawyers' Committee Report on its face also disclaims that it constitutes proof of discrimination.

G. The Crawfords Mischaracterize The Events Of 1996.

There was no contact between the Crawfords and Signet Mortgage after May of 1994, until the Crawfords' counsel sent a letter to Signet Mortgage two years later in 1996 raising allegations of racial discrimination. The Crawfords bizarrely rely on language in a internal letter written in 1996, as result of their demand, in which May related a conversation regarding the Crawfords' neighborhood as follows:

> two appraisers on the Signet Approved Appraiser's List . . . [told me that] the [LeDroit Park] area started to undergo change in the mid to late 1980's however has not taken off as planned. [sic]

From this, the Crawfords infer a "plan" between Signet Mortgage and various appraisers -- including the experts hired in this case -- "to conspire and control the housing market in LeDroit Park." Petition at 10.

The Crawfords also argue that May (referred to in their Petition as "Signet's Senior Residential Appraiser") concluded that the Popkin appraisal with a market value $340,000 "would be acceptable to a lender," taking out of context language in the letter in which this language is found. Petition at 6. What May really said in the letter is that "[i]f one were to review each appraisal separately, they would be acceptable to a lender." May explained that "[b]y use of the word 'separately,' [he] meant that in isolation, without knowing about the other appraisals or the particular market areas, no one appraisal by itself would look suspect to a lender." Nonetheless, May did not conclude that either the 1990 Appraisal or the 1993 Appraisal was "acceptable," in the specific context at hand where among other things, Signet Mortgage also possessed substantial conflicting information.[12/]

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits Regarding The Standard For Proving Lending Discrimination.

The decision of the Court of Appeals in this case is in accord with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and other cases that have addressed *McDonnell Douglas* in the context of alleged lending discrimination. *See Latimore v. Citibank, F.S.B.*, 151 F.3d 712 (7th Cir. 1998); *Noland v. Commerce Mortgage Corp.*, 122 F.3d 551

12/ Furthermore, Calvin Bradford's conclusion cited by the Crawfords, that Signet intentionally discriminated is not based on any "scientific, technical, or other specialized knowledge," and thus carries no weight under Rule 702, Fed. R. Evid.

(8th Cir.1997). Like *McDonnell Douglas* itself, all of these decisions require that a minority applicant provide some evidence that he or she was "qualified" for the loan in order to survive summary judgment in the absence of any direct evidence of discrimination.

A violation of either § 1981 or § 1985(3) requires proof of intentional discrimination. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-273 (1993); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).[13] The Crawfords concede on page 7 of their Petition that "[d]irect evidence of intentional discrimination is not presented in the evidence." They rely instead upon circumstantial evidence. In turn, under the framework first developed in *McDonnell Douglas*, where, as here, there is no direct evidence of discrimination, a plaintiff must present circumstantial evidence of intentional discrimination by first presenting a prima facie case of discrimination, which "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).[14] *McDonnell Douglas* – an employment case – required at a minimum that the plaintiff prove he was "qualified" for the job and that "despite his qualifications, he was rejected" in order to state a prima facie case. 411 U.S. at 802.

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[13] Petitioners did not invoke any other statutes, i.e., the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, et seq., and the Fair Housing Act, 42 U.S.C. §§ 3601, et seq. These claims would be time-barred.

[14] Of course, a defendant may rebut a plaintiff's prima facie case by showing a justification for the action taken. It then becomes the plaintiff's burden to show that the articulated justification is pretext for discrimination. *Id.*

As the D.C. Circuit noted in its opinion below, the Crawfords failed to introduce proof of an appraisal that vouched for the value of the property as of the time of the loan application, April of 1994. This was an express condition of the loan approval process in order for the Crawfords to show they were "qualified" for the loan, consistent with *McDonnell Douglas*. The Court of Appeals' opinion does not hinge simply on whether the Crawfords offered proof of value, as the Crawfords argue on page 18 of their Petition. Rather, the Court of Appeals concluded that the Crawfords failed to offer proof of a "satisfactory subject property appraisal," an appraisal that would have met Fannie Mae Guidelines. 179 F.3d at 928.

The Crawfords further conceded at oral argument that Respondents had adopted Fannie Mae appraisal guidelines, and that Respondents were entitled to follow these guidelines. As the D.C. Circuit noted, "[t]he Crawfords agreed at oral argument that if appraisers followed the Fannie Mae guidelines, they would be 'okay,' that is nondiscriminatory." 179 F.3d at 928 n.6. It is also undisputed that Fannie Mae guidelines required either an appraisal that was no more than four months old, or a re-certified appraisal performed during the previous twelve months. Neither of the appraisers who performed the 1990 and 1993 Appraisals (nor any other appraiser for that matter) was willing to re-certify their appraisals or otherwise opine under oath that the property was likely worth $311,000 within the relevant time-frame.[15] Moreover, neither the

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[15] The D.C. Circuit did not erect an insurmountable hurdle for a plaintiff, as the Crawfords argue. There is no support in the record for the Crawfords' assertion that the appraisers had to be on Signet Mortgage's "approved list" in order to satisfy Signet Mortgage's criteria or to state a prima facie case. Nor did the D.C. Circuit hold that the

Crawfords' own opinion of the value of their house, nor the opinions of their neighbors relating to their own houses (without any basis of comparison to the Crawfords') prove that an appraiser would have rendered a similar opinion. "[I]t is common knowledge that banks and savings and loans certainly do not accept an individual borrowers' appraisals of their own property, but hire professional independent appraisers to perform that task." *Cartwright v. American Sav. & Loan Ass'n*, 880 F.2d 912, 921 n.15 (7th Cir. 1989).

The foregoing is consistent with *Noland*, notwithstanding the Crawfords' argument to the contrary. *Noland* holds that an applicant must produce evidence that he or she was "qualified" for the loan in order to make out a

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Crawfords would not have been able to meet their burden with a retrospective appraisal. In this case, the Crawfords simply made no attempt to present evidence that a qualified appraiser would have assigned a $311,000 value to the property as of April of 1994, either at that time or retrospectively.

The Crawfords' argument that they should be able to offer evidence of value that was never presented to Signet Mortgage at the time of its decision is also without merit because it ignores the fundamental purpose of *McDonnell Douglas* -- which is to serve as a surrogate for proof of the defendants' discriminatory state of mind. The Crawfords' post hoc rationalization of the value of the improvements to their house and the affidavits of value that the Crawfords obtained from their neighbors are not data that Respondents ever saw in making their decision. Thus, this information cannot prove that Respondents knew the Crawfords were qualified applicants or that Respondents consciously declined to extend a loan to qualified applicants. Likewise, the Crawfords' attempt, over Respondents' objection, to introduce an unsworn, unauthenticated appraisal, dated November 7, 1994, has no probative value because it did not even exist at the time of Signet Mortgage's decision. (This appraisal was also inadmissible because it was (a) unauthenticated and (b) hearsay.)

prima facie *McDonnell Douglas* type claim in the absence of any direct evidence of discrimination. 122 F.3d at 553. The factual record in *Noland*, however, was somewhat different. In *Noland*, there was at least some evidence that the applicant was qualified because the lender told the applicant what the qualifying criteria were and then changed the criteria without informing the applicant of the change until after rejection of the loan. The Eighth Circuit nonetheless upheld the grant of summary judgment for the lender on grounds that the applicant was unable to show that similarly situated non-minority applicants were treated differently. *Id.* Like the applicant in *Noland*, the Crawfords have presented no evidence that similarly situated non-minority applicants were treated differently. In addition, unlike the applicant in *Noland*, the Crawfords failed to introduce evidence that they were qualified.[16/]

Latimore v. Citibank, F.S.B., 151 F.3d 712, 714 (7th Cir. 1998), cited by the Crawfords, is also in accord with the D.C. Circuit's decision below. *Latimore* similarly holds that a plaintiff loan applicant must prove at a minimum that he was qualified for the loan by obtaining an appraisal showing a

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[16/] Furthermore, unlike the lender in *Noland*, Signet Mortgage from the beginning told the Crawfords and the Crawfords understood that Signet Mortgage required a current appraisal showing value of at least $311,000. There is no evidence in the record to support the Crawfords' accusation that Signet Mortgage changed its loan criteria after the fact, or applied its criteria any differently for other applicants. Indeed, the Crawfords conceded at the trial level that this was not an allegation made in the case. As discussed above, Signet Mortgage's guidelines did not allow a 95% loan-to-value ratio here because the proposed loan was not a "no cash out" loan.

value that meets the "bank's 75 percent rule" in order to make out a prima facie claim. 151 F.3d at 715.[17]

Accordingly, there is no conflict among the Circuits that would warrant a grant of a writ of certiorari.

II. The Remaining Issues Are Not Appropriate For The Court To Consider.

The Crawfords' state law negligence claim is one of professional malpractice relating to the performance of an appraisal and/or the processing of a loan application. District of Columbia law requires that the Crawfords introduce expert testimony to prove the applicable standard of care. *District of Columbia v. Hampton*, 666 A.2d 30, 35-36 (D.C. 1995). The Court of Appeals followed established precedent in the District of Columbia. Application of the well-settled elements of proof of a state law cause of action is not an appropriate issue to be resolved by this Court.

Judge Urbina excluded the Popkin affidavit upon the Respondents' motion to strike, per Rule 37(c)(1), Fed. R. Civ. P. The Crawfords never identified Popkin as an expert or submitted an expert report, as required by the August 28, 1997 Scheduling Order, Rule 26(a)(2), and Respondents' discovery requests. Popkin was deposed as a fact witness regarding his own appraisal, i.e., the appraisal that the Crawfords' other expert deemed fraudulent. At his deposition, Popkin testified that he had never even seen

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[17] In addition, like the plaintiff in *Latimore*, the Crawfords could not have shown that they were qualified even if the 95% loan-to-value limit for "no cash out" loans were available because the Crawfords did not have an appraisal demonstrating even a 95% loan-to-value ratio.

Fenning's appraisal. Because Respondents had no notice that Popkin would later offer a critique of Fenning's appraisal, Respondents had no opportunity to cross-examine Popkin (or gather other evidence) to show that Popkin's belated attempt to critique the Fenning appraisal was not competent, admissible summary judgment evidence. There is no conflict among the Circuits as to the appropriate standard of review of a district court's exclusion of witnesses. *Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998); *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). Accordingly, this is not a appropriate issue for the Court to address, either.

CONCLUSION

For all of these reasons, the Court should deny the Crawfords' Petition.

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No. 99-878

IN THE

Supreme Court of the United States

GEORGE W. and HARRIET M. CRAWFORD,
Petitioners,

v.

SIGNET BANK, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
To The District of Columbia Circuit Court of Appeals

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONCLUSION 7

Respondents' brief in opposition to the petition for writ of certiorari is replete with distortions and misrepresentations and necessitates the filing of this reply brief.

DISTORTIONS AND MISREPRESENTATIONS

Signet's Approved Appraiser List

Contrary to respondents assertion, page 15 footnote 15, the evidence in the record supports the Crawfords' conclusion that an appraisal must be performed by an appraiser from Signet Mortgage Corporation's approved appraiser list to be acceptable. The Joint Appendix in the D.C. Circuit Court contains several pages from the Signet Mortgage Corporation Product Manual. The only reference to appraisals is that they must be "SMC approved appraisers." In this same regard, Jack May, Signet's Senior Residential Appraiser, conferred with "two appraisers on the Signet Approved Appraiser's List." Respondents' Brief in Opposition at 12.

Signet's Approved Appraiser List is the only source of appraisers used by respondents for determining property value. The Crawfords submission of an appraisal performed by anyone not on Signet's list would have been unacceptable.

The Washington Lawyers' Committee Report

Respondents argue that the Washington Lawyers' Committee Report concedes that it's analysis of Signet's and other lenders' Home Mortgage Disclosure Act data means nothing. The Lawyers Committee concludes that:

> The purpose of this study is not to prove that any particular lending institution has engaged in unlawful

> practices . . . All that can be said about the lenders . . . is that the racial disparities in underwriting and marketing raise serious fair lending concerns that require further investigation. All residents of the Washington, D.C. area have a right to know if their bank or mortgage company is involved in discriminatory practices.

The Lawyers' Committee concluded that specific facts, such as the Crawfords' facts, are needed to bring the statistics in its Report to life. The Lawyers' Committee Report supports the Crawfords' claim of mortgage lending discrimination by respondents.

Signet Does Not Lend in LeDroit Park When the Property Value is More Than $200,000

Respondents did approve six mortgage loans on the Crawfords' street. The properties, however, are located over a mile from the Crawfords' home, appraised for between $105,000 to $107,000, and were purchased by first-time homeowners for between $81,000 to $83,000. The houses are located in a group of 29 townhouses known as the Perry School Townhouses and developed by the North Capitol Neighborhood Development Corporation, of which Mr. Crawford is a member of the Board of Directors and Chairman of the Personnel Committee.

The record evidence proves that Signet and its appraisers will support a loan in a minority neighborhood so long as the property value is less than $200,000. When the value of the property in a minority neighborhood is more than $200,000, however, Signet and its appraisers intentionally suppress the property's value.

Signet appraiser James D. Donnelly performed an appraisal of 2300 First Street for Capital Bank and concluded that the property had a market value of $325,000. Donnelly, however, performed a retrospective appraisal of 2302 First Street for Signet and concluded that the Crawfords' home was valued at $195,000. Donnelly's conduct is consistent with the "plan" of Signet and appraisers on its "approved appraiser list" to lower the value of properties in minority neighborhoods when Signet is the lender.

The Crawfords refinanced their home in May 1998 with Bank of America. The appraiser for Bank of America concluded that the market value of the property was $315,000. The Court can take judicial notice that property values declined in the District of Columbia during the period of 1995 through 1998. Recently, December 29, 1999, the Crawfords obtained a second mortgage on their home and the property appraised for $320,000. The Court can also take judicial notice that property values have recently increased in the District.

Property Values In the Crawfords' Block Are Based Upon Facts, Not Opinions

Respondents misrepresent that the value of houses in the 2300 block of First Street are based upon the Crawfords' own opinion of the value of their house and the opinions of their neighbors concerning the value of their homes. This is not true. The market values of the houses in the Crawfords' block are not opinions offered by the homeowners. The property values are based upon appraisals performed by independent appraisers at the request of banks and savings and loans.

In addition to the Donnelly appraisal referenced above, there is also an appraisal in the record performed by an independent appraiser for a lender that estimates the value of 2316 First Street to be $275,000. Furthermore, the affidavit of Dr. Johanna Ferman is that she purchased 2315 First Street in 1988 for $279,000. All affidavits in the record are based upon facts. The values of the houses in the 2300 block of First Street are not based upon opinions from their owners as contended by respondents. The values are based upon appraisals performed by independent appraisers and the actual sales prices of the houses.

The Word "Superior" and the Use of the Phrase "Superior Neighborhood"

Respondents argue that their use of the word superior "simply means more expensive," and that other appraisers use the term superior in comparing neighborhoods. Brief in Opp., page 9 footnote 9. First, it is a question of fact whether respondents use of the word superior "simply means more expensive." The Crawfords, however, do not challenge the use of the word superior.

Fannie Mae Guidelines explicitly prohibit the use of the phrase "superior neighborhood." It is undisputed that the respondents used the phrase "superior neighborhood" in comparing Kalorama, a predominantly white neighborhood, to LeDroit Park, a predominantly African American neighborhood. Brief in Opp. at 8. Fannie Mae's prohibition on the use of the phrase "superior neighborhood" is just one Fannie Mae Guideline adopted to address discrimination that was violated by respondents. Respondents' assertion that the Crawfords imply that the word "superior" means white is erroneous and misplaced.

Second, Gaylord Curry, who was not an expert1 for the Crawfords, and Gaddie Jenkins did not use the phrase "superior neighborhood" when referring to the location of comparables. Specifically, Curry critiqued the Jenkins' appraisal and, in his opinion, concluded that "[t]his appraisal has utilized sales that are distant from the subject, and which most knowledgeable appraisers would consider in specific locations that are superior to the subject's." The Jenkins' appraisal, on the other hand, does not contain a single use of the word "superior." It is unclear why respondents would proffer arguments unsupported by the record.

Curry's Critique of Appraisals

Gaylord Curry critiqued several of the appraisals in this case. In his report he wrote that because the Popkin appraisal incorrectly indicated the above grade area of comparable property, "[t]hese obvious inconsistencies border this report on fraud." The truth of the matter, however, is that Curry found fault with all appraisals except for the Blake appraisal. Curry concluded that:

> Based upon my experience in this market area, it appears to me that only the appraisal accomplished by Mr. Blake [$225,000 in 1989] appears reasonably reliable as a value indicator of the subject at the time it was accomplished. Neither of the others appear strongly reliable as to the value of the subject property, and its value in [April] of 1994 was most likely something above the Blake appraisal, but less

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1 The Crawfords designated two (2) expert witnesses in this case, Dr. Calvin Bradford and John May, Jr. See Petition for Writ of Certiorari, Appendix D, Memorandum Opinion, p. 21, note 17.

than the others [$340,000].

Based upon subsequent appraisals, Popkin was vindicated.

The NVR Mortgage Appraisal

The June1992 appraisal ($235,000) performed for NVR Mortgage was nearly two years before the Crawfords completed the rehabilitation of their home. When viewed in comparison with the Popkin ($340,000) and Thomas ($337,000) appraisals, performed after rehabilitation was completed, the 1992 appraisal is not relevant to establishing the value of the Crawfords' home.

Mr. Crawford's Occupation as An Attorney

The fact that Mr. Crawford is an attorney is irrelevant and immaterial and an attempt by respondents to distract the Court's attention from the real issues. The facts and circumstances surrounding the Crawfords' changing of attorneys and Mr. Crawford's representing his family in this matter is also immaterial. The respondents insinuate that the Crawfords' changing of attorneys and Mr. Crawford's role in this litigation should, in some way, affect the merits of the case. Or, are respondents of the view that justice is only available for parties represented by influential law firms.

There is Discord Among the Circuits

The D.C. Circuit pointed out that the Seventh Circuit concluded that the McDonnell Douglas framework is not available in a mortgage discrimination suit. Nevertheless, the D.C. Circuit applied the McDonnell Douglas framework. The Eighth Circuit has also applied McDonnell Douglas.

CONCLUSION

Mortgage lending discrimination based upon the race of the applicant, or the location of the property to be financed, is a serious problem in the United States. Mortgage lending discrimination is demoralizing and devastating to the individuals discriminated against, wrecks havoc on federal policies to stabilize urban and minority neighborhoods, and has negative economic impacts on society as a whole.

Respondents' discriminatory lending practices create urban blight, destroy minority neighborhoods, and results in the decline of the Nations Capital. Respondents undervaluing of properties in LeDroit Park does not allow the neighborhood to prosper and denies residents the equal opportunity to fully experience and enjoy the American dream of homeownership.

Notwithstanding the convoluted arguments offered by respondents, the genuine issue of material fact is whether the evidence would support a finding that the Crawfords' were qualified for the loan? In addition, there is discord among the circuits.

The petition should be granted.

Respectfully submitted,

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